Schroeder

"Due Process of Law"

"DUE PROCESS OF LAW"

IN RELATION TO

STATUTORY UNCERTAINTY

AND

CONSTRUCTIVE OFFENCES,

GIVING MUCH NEEDED ENLIGHTENMENT TO LEGISLATORS, BAR AND BENCH

THEODORE SCHROEDER,
68 East Fifty-ninth Street,
New York City.

"*Ubi jus incertum ibi jus nullum.*"

PUBLISHED BY THE
FREE SPEECH LEAGUE,
120 Lexington Avenue,
New York City.

"The manna of liberty must be gathered each day, or it is rotten."

"Only by unintermitted agitation can a people be kept sufficiently awake to principle not to let liberty be smothered in material prosperity."

"Republics exist only on the tenure of being agitated."—(Wendell Phillips.)

"Illegitimate and unconstitutional practices get their first footing in this way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to a gradual depreciation of the right as if it consisted more in sound than in substance."—(Boyd vs. U. S., 116 U. S., 616-635. — 29 L. 746, 752.

It is the duty of Courts to be watchful for the constitutional rights of the citizen & against any stealthy encroachments thereon. Their motto should be obsta principiis" (Resist the first beginnings.)

Bradley. 2/1/1886

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TO THE READER:

Some time ago a lawyer friend of mine wrote these words: "The judicial pendulum is swinging a long way just now in the matter of the construction of offenses from indefinite and uncertain language employed in the statutes. Possibly after a while common sense and reason will resume control."

I am exerting myself toward that better time when reason will resume control, and when even the judicial will shall again be subjected to "the law" which always destroys arbitrary power by being general, uniform, equal, fixed and certain. This pamphlet is but the fore-runner of a more elaborate argument which I have in contemplation.

I especially request that lawyers will be kind enough to send me any suggestion or citation which may bear upon the questions I am herein discussing. Ever for

Truth, Justice and Liberty.

THEODORE SCHROEDER,
63 E. 59th St., N. Y. City.

July 1st, 1908.

THE SCIENTIFIC ASPECT OF "LAW."

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In all the annals of the past, one of the most conspicuous features in the struggle for liberty has been the fight against constructive crimes, which includes punishment for imaginary or psychologic injuries. The condition of England, before the days of the revolution, is thus described by Edward Livingston, Secretary of State under President Jackson, and reputed to be "the greatest lawyer of his time":

"The statute gave the texts, and the tribunals wrote the commentary in letters of blood, and extended its penalties by the creation of constructive offenses. The vague and sometimes unintelligible language employed in the penal statutes, gave a *seeming* color of necessity to this assumption of power, and the English nation have submitted to the legislation of its courts, and seen their fellow-subjects hanged for constructive treason, and roasted alive for constructive felonies, quartered for constructive heresies, with a patience that would be astonishing, even if their written law had sanctioned the butchery."

It appears, historically, that those baneful constructive crimes developed from several specific causes. A union of church and state resulted in punishing the mere constructive injury of heretical speech; the witchcraft superstition resulted in punishing the mere constructive cause of material injuries; the abridgement of the freedom of speech and of the press, also punished psychologic crimes based upon mere constructive injuries; these, with the evils of judicial legislation in defining crimes, were all of the sources for those evils which are so often denounced under the name of constructive offenses. Our ancestors saw the evils and their practical concrete origins, but apparently did not concern themselves with the generalization of the ultimate tests by which to determine the essence of

all constructive offenses. Notwithstanding this, they very effectively barred the door against any recurrence of such evils, if we will but construe our constitution in the light of a truly scientific conception of *the law*, such as will be formulated hereinafter.

To obviate the recurrence to punishment of mere psychologic or constructive injuries our forefathers prohibited the union of church and state, and the abridgement of freedom of speech and of the press. To the same end, and to preclude judicial legislation and its arbitrary tyrannies, they separated the functions of the legislative and judicial branches of our government, and then, as including all these and more besides, they made the more general and comprehensive guarantee that no man should be deprived of life, liberty or property without due process of *law*.

In spite of all these safeguards, and innumerable judicial denunciations of the punishment of constructive offenses, it seems to me that all about me I discover such penalties being inflicted, without its inducing much of a protest. In seeking for an explanation, I have been led to the conclusion that it is to be found in the fact that in reducing the lawyer's calling from a profession to a business, we have put so high a premium upon his commercial acumen, that we have reduced the lawyer from a scientist of the law to a business executive. The result is that not one lawyer in ten thousand has a truly scientific conception of *the law*, or of its essential nature. As best I can I intend to point out the nature of "law" as I believe the few intelligent lawyers view it, and then I will endeavor to deduce therefrom, criteria for determining what are constructive offenses, especially in their relation to *"due process of law."*

THE LAW AS A SCIENCE.

It is often said, let us hope not always in sarcasm, that the law is a science. I wonder if those who speak these words really know what they signify. I shall undertake, I fear in an inadequate way, to state what such words mean to me. Men have a scientific conception of the law, only when they see legal truth as a formulated expression of the natural law of our social organism. To conceive this as a "law" we must understand it, not as a mere acquaintance with, or memory-

knowledge of, the verbally uttered decision in this case or that, or under these or other special states of fact, but we must understand these special legal truths in all their necessary relations to one another, as constituent elements in the induction leading to the most comprehensive generalization; and again, all must be seen according to their own necessary logical classifications as mere special examples of the broadest rational generalization, of legal truth to which all concrete instances must be referred, and from which all specific decisions must be made, by the process of deduction. It is not enough that we discover some more or less crude analogies between these facts and those, and thus by an empirical induction make the decision in that case fit this; on the contrary the law has not reached the dignity of a science until we see the relation of all its special cases to those general principles which are decisive of all causes belonging to the same general class. Let me make a quotation by way of illustration, "During its early stages, planetary astronomy consisted of nothing more than accumulated observations respecting the positions and motions of the sun and planets; from which accumulated observations it came by and by to be empirically predicted, with an approach of truth, that certain of the heavenly bodies would have certain positions at certain times. But the modern science of planetary astronomy consists of deduction from the law of gravitation—deductions showing *why* the celestial bodies necessarily occupy certain places at certain times."

To have accumulated a knowledge of the kind of judgments entered in a large number of cases is not to know "law" —nor to be a scientist of the law. To make empirical inductions from such accumulated knowledge may enable us to decide cases with an approach of truth and justice, but the result is not "law" in the only sense in which a scientist of the law can use that word. The lawyer, whose intellectual attainments are such as to make him a scientist of the law, must have adopted the scientific method for the ascertainment of legal truth. The scientific method requires that his empirical generalizations shall have been included in a rational generalization, which is the formulated statement of *the law*, because it determines conclusively from the nature of things, *how* and *why* certain judgments must be so and thus, the result always being derived by deductions from the ultimate rational gener-

alizations, by which process *the law* thus determines the decision in every particular case, which *law* must always be conformed to, irrespective of a direct estimate of the beneficence of its result in any particular instance. It is this, and this alone, which in my judgment makes the law a science, and though I should be convinced that not many lawyers are legal scientists, still I would not despair. If our conception of the law falls short of being a scientific one, it can only be because the judges and legislators whose duty it is to formulate verbal statements of the law, have not attained the intellectual stature of scientists.

If "*the law*" is a system of rational generalizations to which all specific controversies must be referred, and by deductions from whose uniform standards all controversies must be conclusively decided, then it follows that if no such certain and uniform controlling standard is prescribed by the legislative enactment, and where because of that fact (especially in criminal cases) courts are left free to pronounce their judgments (of guilt or innocence) by empirical inductions based upon their differing personal experience, then, under such circumstances I say, courts do not declare, and are not governed by *"the law,"* but themselves are unconsciously seeking by their judicial legislation to create law, and enforce their own arbitrary edicts; they are not enforcing or maintaining natural law according to the formulated precepts of it, made by the legislative power, but instead they become the executioners of their own lawless wills. All this is but another way of vindicating the maxim "where the law is uncertain there is no law." From the foregoing speculations it already appears that *the law* is something outside of and independent of the judicial mind. Let us now make further inquiry as to the nature of *law*, from the scientific viewpoint.

ON THE NATURE OF THE LAW.

If we would know what is to be understood by a constructive breach of the law we must first achieve a very definite conception of the nature of *law*. After that we can better discern all the conditions which might constitute its constructive breach, as distinguished from its actual infraction.

Just as the laws of mathematics are not created by the mathematicians, nor the physical laws by the physicists, who

discover or make formal statements of them, as also the laws of our thinking are not products of thinking, so the laws—*the real laws*—of a state are never products of judicial cerebration. All *laws* are pre-suppositions which alone make our thinking about them, and statement of them, possible. The province of the court is to discover, declare and enforce, the prior existing *law*, and never to construct or create law. To declare *the law* means only to formulate a verbal statement of it as it exists, prior to, and apart from the judicial formula, and outside of the judicial mind. Thus state *law*, in its proper and technical sense, is but natural justice, as we find it in the very nature of our inter-human relations, and the formulated statements of such artificial legislatively-created rules of conduct, as the law-making power may properly enact, *but only* for the security and realization of natural justice among sentient being. These considerations it seems to me are the reasons underlying the following language from the Supreme Court of the United States: "In the ordinary use of language it will hardly be contended that the decisions of courts constitute law. They are at most, only evidence of what the laws are; and are not of themselves laws."

Swift v. Tyson, 16 Peters 18.

ON THE REQUIREMENT OF NATURAL JUSTICE.

The laws of natural justice are in the nature of things and exist wholly independent of our knowledge of them, and would still exist, though every verbally expressed statement of them should be destroyed. It follows that judicial opinions and statutes should do no more than merely to declare our highest conception, of the most refined sense of natural justice to which humanity has attained, and to provide for its practical realization. If it does either less or more than this, it is a misconception of *the law*, and its enforcement should be declared beyond the power of any court. To declare otherwise would be to assert that our state machinery may be used deliberately and consciously to accomplish a wrong—to violate natural justice.

In accordance with the foregoing conception of law as existing in the nature of things, or as being a human regulation conducing to the practical maintenance of natural justice, it

follows that juridical systems must always conform to right reason, because the essence of right reason consist in the very fact of a conformity of our thinking, with the natural order of things outside our minds. More technically expressed we say legal truth, which is but a subordinate department of truth as a whole, is "the exact correspondence between the subjective order of our [the judge's] conception and the objective order of the relation among things." (John Fiske.) If then a true conception of law in civil matters is one which is an exact correspondence with natural justice, as this exists in the very nature of things, and as a mere part of the natural law of our social organism, then our formulated statements of *the law* must always conform to right reason, because such conformity is the very essence of a true conception of *the law*. Thus understood it is hardly possible to disagree with Blackstone and those authorities following him, which say: "Statutes which violate *the plain and obvious principles of common right* and common reason are null and void."

Bennett v. Bogge, Fed. Case, No. 1319.

Morrison v. Barksdale, 1 Harp. (So. Car.), 101.

Taylor v. Porter, 4 Hill, 140 (N. Y., 1843).

Upon the supremacy of natural law, as the original of all our formulated statements of law, Montesquieu wrote this: "How inequitous the law which, to preserve a purity of morals, overturns nature, the origin and the source of all morality."

"The Spirit of the Laws," Aldine edition, vol. 2, p. 556.

Later Blackstone expressed himself about the supremacy of natural law in these words: "No human laws are of any validity if contrary to the law of nature; and such of them as are valid derive all their force and all their authority from this original."

Blackstone's Commentaries.

Statutes have been held unconstitutional merely because "manifestly contrary to the first principles of civil liberty and natural justice."

Holden v. James, 11 Mass, 405.

Durkee v. City of Janesville, 28 Wisc., 465 and cases.

Calder v. Bull, 3 Dallas, 387-388. (U. S.)

"Reason and the nature of things which will impose laws even upon the Diety."

Fletcher v. Peck, 6 Cranch, 143, see dissenting opinion.

Wilkinson v. Leland, 2 Peters, 1-658.

Terrett v. Taylor, 9 Crauch, 50-52.

I am well aware that many courts, without having weighed the foregoing considerations as to the nature of *law,* have held otherwise, but such courts repudiate and contradict the expressly declared purpose of our constitution and so discredit themselves.

There is little excuse for the existence of government except as affording a method for the authoritative formulation of our best conception of natural rules of justice and promoting their realization in practice. Although the preambles of our Federal, and perhaps most of our State constitutions, proclaim their purpose "to establish justice * * * * * and secure the blessing of liberty," and though to the end of establishing justice "due process of law" was made mandatory, yet judges, guiltless of the scientific conception of *the law,* have not hesitated to contradict the constitutionally avowed purpose of government, and of "due process of law," by declaring that these words do "not mean merciful *nor even just laws.*"

Eames v. Savage, 77 Me., 212.

Judges capable of saying that a state may violate the *obvious* demands of natural justice (as distinguished from an enforcement of laws deciding disputed problems of justice), discredit the state, and invite for themselves contempt. To uphold many such laws as constitutional would justify and might necessitate a revolution by violence, as a means of restoring liberty and justice.

If, in a criminal case, a court should undertake to enforce upon any person, a judgment which was not in the furtherance of natural justice and which did not conform to general, uniform and certain rules of conduct, having an exact, verbally formulated existence outside the mere arbitrary will of the court, and well known, or easily accessible to all, prior to the acts constituting the offence then before the court, I say, if a court should undertake to enforce anything different from such a law, it would not be enforcing *the law* at all, and to submit to it would be submission to a government by the arbitrary and despotic will of a judiciary, unrestrained by subjection to *the law,* and not in any sense would this be a government by courts *according to law.* Criminal punishment under such circumstances would be punishment for constructive crimes.

If the state, in violation of the foregoing injunctions, should be permitted to penalize an act which is not an essen-

tial element in doing actual violence to natural justice, the statute could not be one enacted in the furtherance of the governmental purposes to establish justice and secure the blessings of liberty, and therefore such a law could not be within the legitimate province of such a government as we profess to maintain. Furthermore such a statute, penalizing an act which is not an essential element in violating natural justice, must in itself be the creation of an injustice—that is, it must in itself and from its very nature authorize an invasion of liberty, unwarranted by any necessity for defending natural justice or maintaining equality of liberty; and therefore the enforcement of such a statute would be the deprivation of liberty without due process of *law,* as we now understand *law* in the light of our foregoing study of its nature. I conclude that every such statute as I have last hereinabove described is an attempt to punish for a constructive offence—is a violation of our constitutional guarantee of Due Process of Law. With so much by way of preliminary discussion we may proceed to classify constructive offenses under several heads, indicative of the different sources from which comes the tendency toward the construction of offenses and the wrongful infliction of penalties based upon the creation.

MATERIAL INJURY ESSENTIAL TO CRIME.

It follows from the fact that human justice can deal only with material factors, that an offense to be real, and not merely constructive, must be conditioned upon a demonstrable and ascertained material injury, or an imminent danger of such, the existence of which danger must be determined by the known laws of the physical universe. Our Constitution, both in its guarantee of freedom of speech and press, and in its guarantee of due process of *law* (as we now understand *the law,* according to the foregoing anaylsis) precludes the construction of mere psychologic crimes. The offenses which are based only upon ideas, expressed or otherwise, such as constructive treason, witchcraft and heresy, either religious or ethical, and all kindred psychologic, or other constructive injuries, are prohibited, because the very nature of *the law,* whose supremacy and processes our constitution guarantees, is such that American legislators cannot be permitted to predicate crime upon mere psychologic factors. Manifestly this does

not preclude punishment when these psychologic factors have ceased to be *merely* such, by having resulted in actual material injury as distinguished from constructive and speculative injury; for example, it does not preclude punishment in cases of personal libel, or where the uttered opinion has resulted in crime, under such circumstances as to make one an accessory before the fact, or such as proves a conspiracy to secure its commission. Under such circumstances no man is punished for a mere speech as such, nor for its psychologic effect merely as a psychologic effect, but he is punished for his practical contribution toward the actually realized ascertained material injury, the speech being only the evidence of his complicity in the achievement of the resultant invasion and material damage.

I have spent so much space in efforts to clarify the vision as to this phase of constructive crimes, because it seems to me to be very little understood and very often disregarded. In its practical application, no doubt, the tests which I have prescribed will occasionally run counter to certain moral sentimentalizing which, however, we can afford to dispense with, and which our legislators will refuse to regard seriously when we get an enlightened view of liberty. For this class of constructive crimes the responsibility rests primarily with the legislative department. For the others, now to be discussed, the courts are chiefly to blame.

JUDICIAL LEGISLATION UNDER PRETENCE OF INTERPRETATION.

The next class of constructive offenses is a little better understood. Here the act under investigation is one which, under the former tests, may properly be penalized, but is not within the plain letter of the prohibitive statute: first, because the statutory tests of criminality, though certain in meaning and covering acts of the same general character, do not include the conduct under investigation; or second, because the language of the statute is ambiguous and the act under investigation is not clearly within every possible meaning of the words descriptive of the crime; or third, because the statute is uncertain in that it prescribes no certain and decisive tests of criminality thus making it necessary, if the statute is to be enforced at all, judicially to interpolate such tests. These are the three classes of judicial legislation which is prohibited in criminal cases by the guarantee of "Due Process of Law."

In the first of these instances a judicial enlargement of the field plainly marked out by the statute is so universally recognized as improper, because judicial legislation and therefore within the prohibited constructive offences, as to need no argumentative support. Indeed, all our judicial rules for the strict construction of criminal statutes are founded upon the necessity of prohibiting judges from creating law.

AMBIGUOUS STATUTES JUDICIALLY AMENDED.

The second case, that of ambiguous penal statutes, oftener seduces judges into an abuse of their power by a misapplication of rules of construction. Where the words descriptive of a crime are ambiguous (open to several interpretations, some or all of which are very certain and definite as criteria of guilt), it is erroneously assumed by many courts that it is an exercise of the judicial function of statutory interpretation to select that one among the possible meanings of the statute which is to be enforced. I do not conceive it so. The judicially selected meaning may not be the one which the legislature intended to enact. Certainly it has not received the specific sanction of the legislative branch of the government, any more than every other possible interpretation, and the only conduct which can with certainty be known to be within the legislative prohibition (that is within *the law*) are those acts which are clearly within *every possible meaning* of the statute. If this rule has not been always observed in the matter of ambiguous statutes it is because judges have not seen clearly the true relation between such ambiguity and *the law*.

UNCERTAIN STATUTES AND JUDICIAL LEGISLATION.

In the third case, where definitive description of the crime is wholly wanting, (as distinguished from ambiguity in the definition) because there is an absence of any certain, clear, universal, and decisive tests of criminality, we have a case for the application of the old maxim: "where the law is uncertain there is no law." In such case, if the court should supply the tests of criminality so indispensable to the enforcement of every such statute, those tests would not have the sanction of

the legislative branch of the government, and therefore could not be *the law*, in any criminal case. Supplying these criteria of guilt is therefore clearly a matter of judicial legislation, by means of statutory interpolation, as distinguished from interpretation, and punishment thereunder is punishment for a constructive offence, and not due process of law.

If then we do as we ought and look to the very nature of our social organism to derive therefrom our conception of *the law*, as that word is used in our state constitutions, and the fifth amendment of our federal constitution, then, because the very essence of "law" is natural justice, and because the establishment of that justice is expressly declared to be the purpose of our constitutions, it follows that "law" must always stand as the destroyer of every vestige of arbitrary power, which is always open to be capriciously exercised or unequally applied, and therefore opens the gates to the worst forms of legalized injustice. In the scientific aspect, the "law" is a general rule of civil conduct, (not religious, nor merely self-regarding, nor relating to matters of opinion or of speech so long as the material effect of these terminate with the individual) which rule of *civil conduct* must exist in the nature of things or be duly enacted, in the futherance of natural justice, by the duly constituted law-making power, and the enactment and its publication must precede the conduct to which it is to be applied; which rule of conduct to be "law" must not do violence to natural justice, and therefore every statute penal in character, or one creating artificial rights, if it is to be "law," from the inherent necessity of its formal statement (not by accidental uniformity in the judicial interpolation or construction) must be general and equal, fixed and certain, as to all persons who in the very nature of things bear the same relationship to one another and to the state; and such statute cannot from its inherent necessity be general and equal in its application to all similarly situated, unless it be also so plain and exact in its description of the right created or the conduct prohibited, and in its criteria of guilt, that every man of average intelligence, from a mere reading of the statute may know with mathematical certainty, in every conceivable state of fact, *why* and *how* his legislatively created right attaches or lapses, and whether or not his proposed conduct is permitted or penalized; furthermore a penal statute can predicate an offence and its punishment only upon an

actually ascertained material injury, or the imminent danger of such, ascertained according to the known laws of our physical universe, which material injury must be imminent to or actually realized by some sentient being, not giving a voluntary, undeceived consent, or one who from immaturity or infirmity is incapacitated for giving that consent. If a statute does not conform to all these requirements, then I believe it cannot be *the law*, and all penalties inflicted under such other statutes are the deprivation of life or property for mere constructive offences, and cannot constitute "due process of law."

Herewith I will close the discussion. If I have succeeded in contributing a little toward clarifying our vision as to the scientific aspect of constructive offences in relation to due process of law, I am glad. When this essay was first written for the *American Law Review*, in submission to the scientific method I cited no authorities for the truth of my contentions but rather sought for that truth without which "authorities" cease to be even evidence of *the law*. In this revision I have added a little and cited a very few authorities for the support of our timid logicians. Later we shall see how these views harmonize with judicial opinions, which however seem to have arrived at their conclusions by other intellectual methods, than those herein contended for, and evidently without any presentation or consideration of the arguments herein presented.

CONCERNING UNCERTAINTY AND DUE PROCESS OF LAW.

Revised from *The Central Law Journal*, Jan. 3, 1908.

Nowhere in encyclopedias or text books have I been able to find any discussion as to the relationship between uncertainty in statutory enactments, and the constitutional requirement of due process of law. The subject is of special importance in the criminal laws where in late years we find innumerable enactments in which epithetic vituperation and judicial legislation serve in lieu of a necessary statutory exactness in the definition of that which it is intended to prohibit. In the judicial decisions to be hereafter cited the subject is of course discussed somewhat, but all of them combined hardly constitute anything like a comprehensive survey of the question. That is the reason for these disquisitions.

That a deprivation of liberty or property may be due process of law, two things must occur. First there must be a valid "law," within the meaning of that word in the constitutional phrase "due process of law," and secondly the process prescribed by that law must be accurately pursued. Here I am directly concerned only with one phase of the question: what is essential as to the content of a legislative enactment to make it a criminal "law" within the meaning of the constitution? Judicial opinions have often commented upon uniformity and universality of application, to all who in the nature of things are similarly situated, as an essential to the very existence of a law. Here it is proposed only to discuss the effect of uncertainty in a criminal statute, as related to the nonexistence of "law," because under such uncertain statutes, courts must indulge in constitutionally prohibited judicial legislation; and because statutory uncertainty excludes the requirements of unavoidable uniformity of application to all who are naturally similarly situated. In other words it is proposed to resurrect the ancient maxim "*Ubi jus incertum ibi jus nullum*"

(where the law is uncertain there is no law) and to make it a rule for the interpretation of the "due process of law" clause of our constitutions.

In order that my conclusions may not be discredited by the use of false analogies I deem it wise to begin with a short analytical statement which will differentiate the problem which I propose to discuss from kindred problems arising from uncertainties of other than criminal statutes, and the probable different effect which uncertainty may produce in different classes of legislation. Even though the preliminary discussion may be superficial, it seems needful since I have nowhere found any general discussion of the subject.

Uncertain Statutes Classified.—It is conceivable that some civil enactment of a legislature would merely be an effort verbally to declare, and legally to establish and maintain, some rule of natural justice which is inherent in the nature of things and of the social organism. Uncertainty in such a statute, resulting from an unfortunate choice of words, could do no serious injustice even though the court, either by legitimate construction or judicial legislation, would make it certain, if in doing so nature's rule of justice was not violated, nor artificial penalties inflicted. It is probable that uncertainty in such a statute would not necessarily effectuate its annulment. At any rate I exclude that class of cases from my discussion. A second class of statutes which might be objected to because of uncertainty, are those which create artificial civil remedies for the maintenance of natural justice. Here ambiguity and uncertainty can again be judicially eliminated in accordance with the legislative intent, if that is reasonably ascertainable from the act itself, and no injury result to innocent parties, because the postulate was that the maintenance of natural justice was the only end to be achieved by the use of this new artificial remedy. For the same reason such laws may also be retroactive.

Chamberlain v. City of Evansville, 77 Ind. 551.

Davis v. Ballard, 1 Marshall (Ky.), 579.

The third class of uncertain statutes are such as declare a rule of justice not derived from nature as such, but finding its foundation in some artificial condition of legislative creation. The limitation of the liability or rights of corporate stockholders might be an illustration. When in such legislation the effect is to curtail the responsibility which naturally

should flow from one's act, great exactness in expressing the legislative intent to that effect would be required, since every intendment must be indulged in favor of the natural consequences of one's act operating under natural conditions. But I am not going to discuss this either. I have mentioned these classes only to point out superficially their probable difference from the next class, so that, in the mind of the reader, my argument may not be subjected to unmerited discredit, because of the thoughtless use of false analogies.

The fourth class of legislation, of which uncertainty may be an attribute, includes all those laws which are intended to create and enforce artificial rights or which are punitive in their character. The creation of artificial rights such as arise from the establishment of a public postal system, patent rights, and copyrights, are all laws of this character wherein the statute must describe with the accuracy required for a penal statute upon what conditions the right may vest or be destroyed, else again we are governed by the arbitrary will of men, and not according to *the law*. The relationship of "due process of law" to an uncertainty in the statutory specification of that which is made punishable by it, is the special matter here to be discussed.

Every state in the union has from one to several score of penal statutes in which no words of exact meaning serve to define with any certainty what it is that is prohibited. In the last thirty years, under only one class of these uncertain statutes, about 5,000 convictions have been secured, and it is fair to assume that under all others including an infinite variety of vague municipal police regulations there have been some 20,000 more citizens deprived of liberty and property and yet, seemingly no one has ever doubted that a conviction under such statutes constitutes due process of law. This makes me wonder if I am dreaming or if the whole rank and file of the bar and judiciary have forgotten the original meaning and purpose of "the law of the land." I do not even except the Supreme Court of the United States, because it, like all the appellate courts of all the states, has repeatedly enforced such laws without a doubt ever crossing its mental horizon, either originating with the court or the attorneys appearing there to argue in such cases.

The most conspicuous and most generally approved examples of these many and outrageously uncertain laws, are

those which in various ways penalize "indecent, obscene and disgusting" literature and art. Those who need to have a concrete example in mind, while the discussion proceeds, may be thinking of those laws as a sample of many others which must be annulled if my contention is correct.

Uncertain and Ambiguous Statutes Distinguished.—First of all we must bear in mind the distinction between an ambiguous statute and an uncertain one. An ambiguous statute I conceive to be one which is expressed in words some of which have several different meanings, all, or some of which meanings, would leave the statutory signification so certain as not to require any additional words to make its meaning plain and uniform beyond doubt, to every man of average intelligence. When that is the case the problem is one of construction, in the method of which due regard is to be had, first for the liberty of citizens and second for the legislative intention, which however must be gathered exclusively from the words of the act itself. The rules for statutory construction will always protect the defendant, so he shall not be punished if there be any reasonable doubt as to whether his act necessarily comes within the very letter of all of the possible meanings of the statutory prohibition. If it does not come within every possible interpretation of the legislative language the accused must have the benefit of the doubt under the rule of strict construction. In a statute which is only ambiguous, we can thus avoid all possibility of raising the constitutional question which I am proposing to discuss. If in criminal cases such rules for a strict construction do not safeguard the liberties of citizens, they are convicted under judicial legislation, and not by "due process of law."

By an uncertain statute, as contradistinguished from an ambiguous one, I mean a statute which is uncertain because incomplete in its description of the artificial rights created by it, or the act which it proposes to punish. Thus an uncertain statute is one which, when applied to undisputed facts of past or present existence, is incapable of any literal enforcement, or incapable of enforcement with absolute certainty and uniformity of result, except by the judicial addition of words, or tests, which may or may not have been intended by the legislature, but which are not unavoidable implications from the statutory language alone. It will be contended that such an uncertainty in a statute, creating an artificial right or punishment, makes

the enactment unconstitutional because in its practical operation and enforcement it unavoidably involves *ex post facto* judicial legislation in defining the crime, and therefore is not "due process of law," and is an arbitrary government of men and not of law. As to the requirement of certainty in laws creative of artifical civil rights, see

Blanchard v. Sprague, Fed. Case No. 1517, and cases.

Also, Bittle v. Stuart, 34 Ark. 229-232.

Ferrett v. Atwill, 1 Blatchford, 157.

Uncertainty of Evidence and of Law Distinguished.—These generalizations can hardly provoke much antagonism. It therefore seems to me that the difficulty lies chiefly in a clouded vision concerning their application to concrete facts. We shall presently see how in some instances it is not at first clear whether the uncertainty is inherent in the statute or arises from doubt as to the probative value of the evidence adduced under it. We must also bear in mind the difference between uncertainty which arises because the statute attempts to make guilt depend, not solely upon facts of present or past existence, but also requires a decision upon an essential element of the crime concerning speculative and problematical tendencies towards future results, of such a character as are undeterminable with accuracy and uniformity by the known laws of the physical universe. Again we must observe the difference between a doubtful sufficiency of evidence to establish a fact of past or present existence, and which beyond all question is of a demonstrable character, and that other case of doubtful sufficiency of evidence to establish a fact, not of past or present material actuality, and which from its very nature is therefore incapable of certain demonstration, under the known laws of the physical universe, but is by the statute required to be proven as an element of the crime. In the former case the uncertainty of guilt or innocence is not chargeable to uncertainty of the statute. In the latter case it is wholly due to such uncertainty, because a conclusion as to the present existence of an unrealized, non-physical or psychologic tendency, is but an unsupported belief as to the doubtful possibility of a future doubtful event. Where such an uncertainty inheres in the statute itself, and is of the essence of the crime it attempts to define (as is the case with our obscenity statutes and the judicial legislation creating tests of obscenity), then in the very nature of things guilt must always be determined by

surmise, speculation, caprice, emotional association, ethical sentimentalizing, moral idiosyncrasies or mere whim on the part of judges or jurors. Punishment for such a "crime," or under such a statute is the arbitrary deprivation of property, of liberty, or both according to the dictates of men not vested with legislative authority, and therefore is not according to "due process of law."

Uncertainty Concerning the "Obscene."—In the obscenity statutes there is no question of construing involved verbiage, but solely one of defining the word "obscene." Let us first clearly understand what we mean by a "definition." If the word "water" had been used in a statute, every average man would at once translate that word into the same general mental picture. Every such reader would probably define the word "water" as standing for a certain transparent, odorless fluid, of the identical kind with which he, and every one else, has had abundant experience. There never would arise in any man's mind any doubt as to what concrete concept the general word "water" symbolized, even though it might become a matter of inquiry, whether a particular substance was water or peroxide of hydrogen. That doubt is not as to the meaning of the word, but one concerning the past or present existence of the corresponding objective fact; one of classifying the matter as water. When such an issue has arisen we do not resort to a definition of the word, for the purpose of making certain what concept the word "water" was intended to convey; instead, we call in experts to apply the chemical tests by which the objective material, "water," is differentiated from peroxide of hydrogen.

To determine the classification of a particular substance we apply mathematically exact and always uniform tests, not created by statute and not a part of a judicial definition of any word used in the statute. If such exact tests exist in the nature of things there would be no occasion for legislatures or courts to prescribe them. If they do not exist in the nature of things perhaps the legislature has the right and power to create its own artificial tests or definitions, but in a criminal statute they must be of equal certainty with the ascertained laws of the physical universe. If neither science nor the statute furnishes us with a definite test by which to determine the existence of those things expressed by statutory words and which are essential to a definition of a crime, then

the law is void for uncertainty and the lack of statutory tests of criminality cannot be supplied by the courts since that would be judicial criminal legislation and *ex post facto* at that.

If such tests were not a matter of exact science, but merely a matter of speculation, or necessary judicial creation in the attempt to enforce such an uncertain law, then they would be unconstitutional judicial legislation and not definition nor statutory interpretation. Furthermore, if such tests are not of mathematical certainty, then the law would be a nullity because "where the law is uncertain, there is no law." Let us now keep in mind the word "water" (in contrast with the word "obscene,") and the character of those differentiating tests, not of statutory origin, nor necessarily implied in the statutory words, but by which we, as a matter of physical science, distinguish the substances of that for which the words stand.

With the foregoing distinction in mind, I affirm that no human can define the word "obscene" so that every reader, even with the help of the test, or definition, must receive therefrom the same concrete mental picture. The reason obviously is, that unlike the word "water," the word "obscene" stands for no particular concrete objective quality, but always and ever stands for an abstraction, in which is generalized only subjective states, associated with an infinite variety of objectives, and therefore in the concrete it will always have a different significance for every individual, according to what he has personally abstracted, from his peculiar and personal experience, and classified according to his own associated emotions of disapproval, and included within his personal generalization "obscene." Each individual therefore reaches a judgement about obscenity according to his own ever-varying experiences, and the peculiarly personal emotional associations (of approval or disapproval) which are evolved from these, as well as the degrees of his sexual hyperaestheticism.

See "What is Criminally Obscene" in *Albany Law Journal,* July, 1906:

"Legal Obscenity and Sexual Psychology—" in the *Medico-Legal Journal*, September, 1907. *Alienist and Neurologist,* August, 1908.

Also "Freedom of the Press and Obscene Literature," a pamphlet published by The Free Speech League, 120 Lexington avenue, New York.

"Varieties of official Modesty." *Am. Jour. of Eugenics* Dec., 1907.

From this indisputable fact, it follows that the word "obscene" is indefinable as a matter of science and the criminal statute, of which that word is an indispensable element, is void, because "where the law is uncertain there is no law," and no "due process of law."

We must make still clearer, if possible, the difference between the uncertainty of the "obscene" and other remotely similar uncertainties. Some will ask, is not the uncertainty of the existence of a special intent which sometimes is made an essential element of a crime, just as uncertain as the unrealized psychologic tendencies of a book, which are the judicial test of its obscenity? I answer "No!" The existence of that intent as to past acts is in its nature a demonstrable fact. The accused if he would tell the truth could settle it beyond a doubt. Here the uncertainty is one of evidence not of statutory tests of crime. An unrealized psychologic potential tendency of a book upon its hypothetical future reader, has only a speculative future existence, not determinable with exactness by any known law of the physical universe, and therefore is not a demonstrable fact but one that we only guess at, and as to which neither the accused, nor any one else, can furnish certain information, nor have any certain advance knowledge, as to just exactly what will induce the court or jury to judge it to be criminal. The criminal intent of a man charged with crime is a fact which in point of time antedates the indictment and verdict, and has such prior existence objectively to the mind of the juror or trial court. Not so with obscenity. The test by which juries are instructed to determine the existence of "obscenity," depends upon their speculation about the psychologic tendency of a particular book, upon a future hypothetical reader, which tendency has not yet become actualized at the time of indictment or trial, and which psychologic tendencies are not known to us to be controlled by any exact known law having the immutability of the physical laws of our material universe. It follows that unlike specific intent which is a demonstrable fact of past existence and objective to the mind of the court, the unrealized psychologic tendency, by which a particular book is judged "obscene," has no demonstrable existence except as a belief about a doubtful future possibility, and existing exclusively as a mere belief in the mind

of the trial judge or jury, and without any known proven or provable present, corresponding objective. Such an uncertainty is one of law and not of evidence, because it arises out of the fact that the statute (or the judicial legislation under it as to the tests of obscenity) predicates guilt upon a conclusion about an undemonstrable factor of speculative future existence.

No legislature has the power to penalize travel in an automobile at a "dangerous speed," and leave to the trial court or jury to say in each case whether the speed is dangerous or not. What is a "dangerous" speed is a legitimate subject for the exercise of legislative discretion, and is determinable only by the legislature, and its authority cannot be delegated to the varying judgments of varying juries. So likewise what is to be deemed of dangerous moral tendency is a matter exclusively of legislative discretion, and must be determined and definitely fixed by decisive definition of the law-enacting power, and the formulation of tests cannot be delegated to the varying judgments of varying courts or juries. Since the "obscenity" of a book is not by the statute defined to consist in any of its sense-perceived qualities and since therefore the legislature has not completed nor expressed its legislative discretion to decide what is deemed to be of "dangerous tendencies," and since that legislative function cannot be delegated to the jury or judge to be exercised *ex post facto* or otherwise, it follows that there is no law upon the subject and no due process of law in any such prosecution.

On the Certainty Essential to the Validity of a Criminal Statute Against Obscenity.—To constitute a valid criminal law the statute under consideration must so precisely define the distinguishing characteristics of the prohibited degree of "obscenity" that guilt may be accurately and without doubt ascertained by taking the statutory description of the penalized qualities and solely by these determine their existence in the physical attributes inherent in the printed page. Judicial tests of "obscenity" cannot be read into the statutory words. Nor can official or judicial speculations (of a character not calculated to discover such definitely penalized physical qualities in the book), be permitted so long as they deal only with a mere unrealized psychologic potentiality, for influencing in the future some mere hypothetical person. Such speculative psychologic tendencies are never found with certainty in any book, but are

read into it, with all the uncertainty of the *a priori* method, as an excuse for a verdict of guilty. Even if the legislative body attempted to authorize such a procedure it would be a nullity under the maxim "Where the law is uncertain there is no law." Therefore such procedure cannot be "due process of law." An unrealized psychologic tendency cannot be made the differential test of criminality, although such tendency may properly appeal to the legislative discretion and may properly result in penal laws wherein the statutes and not the courts, specify the tests, definite and certain, by which to determine what it is that is deemed to possess the criminal degree of such dangerous tendency.

General Statement as to the Required Certainty of Criminal Statutes.—We now come to the contention that a criminal statute cannot constitute "due process of law," unless it is general, uniform, fixed and certain. These qualities are more or less related since if a law is not fixed and certain it can seldom be general and uniform in its application. Now we are specially interested to get a more condensed summary as to what is meant by the requirement of fixity and certainty, in a statute.

Our claim is that a criminal statute to constitute "due process of law," must define the crime in terms so plain, and simple, as to be within the comprehension of the ordinary citizen, and so exact in meaning as to leave in him no reasonable doubt as to what is prohibited. Those qualities of generality, uniformity, and certainty, must arise as an unavoidable necessity out of the very letter of the definition framed by the law-enacting power, and not come as an incidental result, from an accidental uniformity in the exercise by courts of an unconstitutionality delegated legislative discretion. If a statute defining a crime is not self explanatory but needs interpretation or the interpolation of words or tests to insure certainty of meaning, or because its ambiguity permits of more than one judicial interpretation, then it is not the law of the land, because no such selected interpretation of the courts has ever received the necessary sanction of the three separate branches of legislative power, whose members alone are authorized and sworn to define crimes and ordain their punishment. Laws defining crimes are required to be made by the law-making branch of government because of the necessity for limiting and destroying arbitrariness and judicial discretion in such matters. That is what we mean when we say ours is

a government by law and not by men. It follows that it is not enough that uniformity and certainty shall come as the product of judicial discretion, since "law" is necessary for the very purpose of destroying such discretion in determining what is punishable. No single authority taken by itself justifies all the contentions which I have generalized herein above. Yet every separate portion of the generalization has some support in some creditable authority. My effort has been to generalize all that I have gathered from a perusal of all of the authorities to be quoted hereafter.

THE HISTORICAL INTERPRETATION OF "LAW" IN RELATION TO STATUTORY CERTAINTY.

REVISED FROM *The Albany Law Journal*, APRIL, 1908.

As I view history, the evolution of organized government toward liberty, especially in its relation to laws which are penal in character, is clearly divided into three general classes of tendency. The first of these manifests itself in the effort to restrain autocratic sovereigns and their minions in the arbitrariness of their power to punish, by subjecting their wills and penalties to the authority of prior known rules or laws. The second step in this evolution toward liberty is to curtail the authority of the lawmaking power as to the manner of its exercise, so that it may not, even under the forms of law, violate that natural justice which requires uniformity of the law in its application to all those who in the nature of things are similarly situated, which uniformity, of course, is impossible unless the law is certain in the definition of what is prohibited. The third tendency is marked by the curtailment of the legislative power as to the subject matter of its control, so as to conserve a larger human liberty by excluding certain conduct —and progressively an increasing quantum thereof—from all possible governmental regulation, even by general, uniform, and certain laws. This should later limit legislation to the prohibition of only such conduct as in the nature of things necessarily involves an invasion of the liberty of another, to his material and ascertainable injury. I have no doubt it was such a government, of limited power to regulate human affairs, that the framers of American constitutions intended to establish.

The first stage of the evolution above indicated we generally term a lawless government of men, in contradistinction to a government by men according to law, and such a government of men is always despotic and arbitrary, although it may at times be a relatively benevolent despotism. The second stage means a government by men according to prior established rules, which rules may be as invasive and unjust as the

legislative power sees fit to make them. This condition is aptly described as tyranny by the laws, of which we find many examples all around us. The third stage wherein the legislative power is limited to the suppression of acts which are necessarily, directly and immediately, invasive, is aptly termed liberty under the law. Our present stage of evolution, so far as the leaders of thought are concerned, is probably to be located near the beginnings of this stage, and in the course of a few thousands of years we may attain to something approximating real liberty under the law; and in another million years we may attain to the Anarchist ideal, which is liberty without law, made possible because no one has the inclination to invade his neighbor, and all are agreed as to what constitutes an invasion. The great mass of Americans, and humans generally, are now in that stage of their development which compels a love of tyranny under the forms of law,—a tyranny tempered only by the discretion of the ignorant, such as know nothing of liberty in the sense of an acknowledged claim of right to remain exempt from authority.

The transition from despotism to government by law, in its earlier stages is marked by the misleading seemings of law, which, however, are devoid of all its essence. This is illustrated in many of the miscalled laws of the Russian Tsar, and also in the Chinese code, which latter prescribes a punishment for all those who shall be found guilty of "improper conduct," without supplying any further criterion or test of guilt. Manifestly under such authority the magistrates are justified in punishing anything which whim, caprice, or malice might prompt them to adjudge "improper." Accordingly, we have a state of affairs wherein under the misleading appearances of law everything is condemned, and the arbitrary will of the officers of the State again creates the penalty instead of merely enforcing "*the law*" as they find it. Thus, while observing the outward forms and seemings of law, the people are still governed by the mere despotic wills of officials.

Upon the questions as to what are all the essentials of *law*, and what are the limits of liberty we still have in the main, very crude thinking and perhaps still more crude efforts toward generalizations. So far as my investigations have informed me, no court has had the confident clarity of vision, to even attempt the formulation of a comprehensive general statement as to the limits of liberty and governmental control.

This of course means that our judges are still in that early stage of their intellectual development wherein this branch of the law has not become a science. However it is a most deplorable state of mind which too often impels courts to confess to the permanent intellectual bankruptcy of the judiciary by asserting that such definitive generalizations are impossible.

In the present essay I am going to deal only with that one element of law which imperatively demands *certainty* in the penal statutes. In the *Central Law Journal*, Jan. 3, 1908, I dealt with the requirements of certainty as applied to one class of crimes. In the *Am. Law Review* for June 1908, I evolve a declaration as to the meaning of "Law," interpreted from the scientific viewpoint. The present purpose is to inquire into the historical verdict as to the reasons which make *law* a necessity and especially the verdict of all lovers of liberty as to the degree of certainty required to make a penal statute THE LAW, and its enforcement "due process of law." The method will be to exhibit the facts and the authoritative declarations concerning this question as these appear in our juridical history. This fragmentary material, often includes very crude statements of imperfectly conceived principles, as well as mere empirical generalizations, but out of it we can erect a rational generalization, and this will be done so far as is necessary to determine the degree of certainty in *the law*, as the same is formulated in penal statutes.

I confess that it seems to me as though men claiming to be learned in the law should be presumed to know all that follows, and yet it is self-evident that they do not. I say self-evident, because the fact is notorious that among the many uncertain criminal statutes those only which are directed against "obscene, indecent, filthy or disgusting" literature and art, which words are as vague as a London fog, (see "Varieties of official Modesty" in *American Journal of Eugenics*, Dec., 1907; "What is Criminally 'Obscene,' *Albany Law Journal*, July, 1906; "Legal Obscenity and Sexual Psychology;" *Medico-Legal Journal*, Sept., 1907, *et seq;* "Freedom of the Press and 'Obscene' Literature," Published by the Free Speech League, 120 Lex. Av., N. Y. City. See also "Uncertainty and Due Process of Law" in *Central Law Journal*, Jan. 3, 1908), have resulted in over 5000 persons being deprived of life, liberty, or property, and yet it seems *hardly* to have occurred to any one connected with these cases to question the constitutionality

of those laws because of their uncertainty. Such facts, and numerous equally vague statutes and municipal ordinances which are continually being enforced, without having their constitutionality questioned, demonstrate that the intelligence of the profession in general has not yet risen to the point where there is any need to apologize for attempting to enlighten its members concerning the constitutional requirement of certainty in penal statutes.

EARLY WRITERS ON THE NECESSITY OF LAW.

John Adams, in "A Defense of the Constitution and Government of the United States," defends at some length the proposition that even under laws to which all are equally subject the Majority may oppress the minority. In this connection he speculates about the meaning and limits of liberty, in the course of which discussion he quotes from numerous old authors about the necessity of a government according to *law* to prevent the tyranny of arbitrary punishments by the magistrate. I will now condense some of Mr. Adams' quotations and speculations, asking the reader as he scans the following quotations concerning the necessity for having princes and judges, govern according to *law*, always to bear in mind the essential nature of *the law*, in contradistinction to arbitrary edicts.

"It is weakness rather than wickedness which renders men unfit to be trusted with unlimited power. * * * Junius says: Laws are intended, not to trust to what men will do, but to guard against what they may do. Aristotle says, that 'A government where the Laws alone should prevail, would be the kingdom of God.' This indeed shows that this great philosopher had much admiration of such a government: Aristotle says too, in another place, 'Order is law, and it is more proper that *law* should govern, than any one of the citizens upon the same principal, if it is advantageous to place the supreme power in some particular persons, they should be appointed to be only guardians, and the servants of the laws.' These two are very just sentiments, but not a formal definition of liberty. Livy, too, speaks of happy, prosperous, and glorious times, when '*Imperia legum potentiora fuerant quan hominum.*' But he no where says that liberty consists in being subject only to the *legum imperio*. Sidney says, 'No sedition was hurtful to Rome, "until through their prosperity, some men gained a power above the laws.'

In another place he tells us too, from Livy, that some, whose ambition and avarice were impatient of restraint, complained that *'leges rem surdam esse, inexorabilem, salubriorem inopi quam potenti;* And in another that no government was thought to be well constituted, unless the laws prevailed against the commands of men.' But he has no where defined liberty to be subjection to the laws only. Harrington says, government *de jure,* or according to ancient prudence, is an art, whereby a civil society of men is instituted and preserved upon the foundation of common interest, or, to follow Aristotle, and Livy, it is an empire of laws and not of men. And government, to define it according to modern prudence, or *de facto,* is an art, by which some man, or some few men, subject a city or a nation, and rule it according to his or their private interest, which, because the laws in such cases are made according to the interest of a man, or a few families, may be said to be the empire of man, and not of laws; Sidney says, 'Liberty consists solely in an independency on [of] the will of another, and, by a slave, we understand a man who can neither dispose of his person or goods, but enjoys all at the will of his master." And again, "As liberty consists only in being subject to no man's will and nothing denotes a slave, but a dependence upon the will of another; if there be no other law in a kingdom but the will of a prince, [or of the judiciary] there is no such thing as liberty!"

"A Defence of the Constitution," etc., letter XXVI in Vol. 1.

It appears sufficiently evident from these past contentions for liberty that the necessity for statutes in criminal cases arises out of the necessity for strengthening the weakness and curbing the passions of judges, who, according to all experiences and while remaining human, cannot be safely trusted with arbitrary power to determine what shall be punishable. Since such are the reasons uniformly assigned by the older philosophers for their insistence upon subjecting the will of judges to the law, it follows that criminal statutes fall short of satisfying the demand for law, if by their uncertainty they compel, or permit, judges to exercise a discretion in framing tests of criminality such as are not specifically written into the very words of the penal code. Let us now briefly trace these same influences in the origin of magna charta and the English conception of "the law of the land." This of course is re-

stated, without being altered, in our American constitutional guarantee of "due process of law." A little farther on we consider the later unfoldment of the judicial interpretation of "law."

MAGNA CHARTA AND "THE LAW OF THE LAND."

The ancient prohibition against an infliction of penalties "without due process of law," or, what usually amounts to the same thing, those inflicted under "ex post facto laws," or for mere constructive injuries, or crime, was the most essential and fundamental guarantee of an Englishman's liberty.

King John, we are told, filled his coffers by confiscation and cruel extortions. He invited dignitaries to London, then declared them prisoners until they should pay large fines. These penalties were not inflicted for offenses against any general or prior known laws, such that with certainty could have informed the citizens in advance that their conduct was illegal, or warn them of the penalty thereof. "Liberty of all kinds was vendible in the reign of John" precisely because there was no law, in the sense of general rules with undoubted certainty of meaning, to define the limits of liberty or furnish a refuge of defence for the citizens in the exercise of his liberty, or to curtail the arbitrary power of a tyrant King or his judiciary.

To prevent this lawlessness of official power as exemplified in the arbitrary infliction of penalties, the barons by force exacted the Magna Charta. In that document, as confirmed by Henry the III and Edward the I, we find it stated that "No free-man shall be taken or imprisoned or disseized of his freehold or liberties, * * * but by lawful judgment of his peers or by the law of the land." (Chap. 29 Magna Charta). If read in the light of the historical facts which brought this into being it is manifest that the primal purpose of all this was that no man might be deprived of his property or liberty or be tricked into criminality, by any unknown or uncertain rules, such as would not warn him in advance, and with unerring certainty, that his conduct was prohibited.

The Magna Charta required only that criminal statutes should be certain and general. It did not yet by its strict letter prevent their being made so after the fact charged as crime, if the King and Parliment saw fit then to prescribe a punishment. This furnished the opportunity for shifty tyrants to evade the spirit of Magna Charta, and they did it. In the 25th Edward III, a law provided thus: "It is accorded, that if any

case, *supposed* treason, which is not above specified, doeth happen before any justices, the justices shall tarry without any going to judgment of the treason, till the cause be showed and declared before the King and his Parliment whether it ought to be judged treason or other felony." (English Liberties 64). Thus tyrants kept the latter of the "due process of law" provision of Magna Charta, and yet accomplished quite effectively the repudiation of its spirit and of the very essence of *law*, and thus they again successfully distroyed liberty. From such circumstances grew the demand which resulted in a charter-prohibition against *ex post facto* laws.

However the tyrants are always fertile in the evasion of charters and constitutions, such as are intended to limit their arbitrary power, and correspondingly to protect the citizen against official invasion. So next we find men imprisoned under the authority of a special royal commission, which implied a process similar to our present occasional excutive legislation. There were not wanting Judges who, impelled by a lust for power or even more base motives, were ready to affirm the validity of such evasions of the English Charters of Liberty, by the judicial engraftment of exceptions, called martial law. And so it became necessary to make English liberties more safe, by perfecting the writ of Habeas Corpus, and securing the re-affirmance of the former safeguards of liberty. In all of the English charters of liberty, and their various re-affirmations, one principle is always discernable in the use of such words as "due process of law," and by the "law of the land." It was not the purpose to change the person of the despot, or to transfer despotic power from an autocrat to the judiciary; neither was it intended merely to influence, those vested with despotic power to change the mode of exercising their discretion under it. On the contrary, the plain purpose was to destroy the discretion itself, so as, at the trial of an accused, to preclude every possibility of the arbitrary judical determination as to what should be the criminal statutes as applied to his acts. All along the history of these stormy times, it is made plain that the charter phrases, for the protection of liberty were designed to mean that a man should be deprived of liberty or property except by a prior duly enacted publicly promulgated law, which to be a "law" must be general in terms equal in its application to all who in the nature of things are similarly situated and to accomplish

this it must be so certain as to its meaning that no man of ordinary intelligence could be misled by it. The manifest intention was to safe-guard liberty, against every arbitrary determination of guilt in a manner that could not be realized if an enactment should lack any of these qualities, and in consequence we must say that a conviction under such statute would not be according to *the law*, and therefore would not be within Magna Charta or our own constitutionality guaranteed "due process of law." If a statute defines a crime in uncertain terms, a judge, who, under the pretext of construing it, should attempt to supply the absent but necessary certainty of meaning, through judicially created tests of criminality, then, as to the person on trial, such a judge would be enacting an *ex post facto law*. If such judicial legislation should thereafter be uniform in all subsequent cases, the uniformity would still be a matter of accidental uniformity in the exercise of arbitrary judicial legislation, and not a compulsory uniformity, imposed by definite and certain legislative enactment. Even under uniformity of judicial legislation there would still be the absence of that unavoidable uniformity which should result from subjecting the judical will to the certainty of a statute and which compulsory conformity is an indispensable requirement of "law," and of "due process of law." Now let us inquire how this interpretation of the historical events shall harmonize with the views of the early writers, interpreting the charter phrases which were incorporated into our constitution. Here let it be remembered that our constitutional guarantee of "due process of law" was adopted after most of the following construction had been placed upon the word "law," and probably because of these constructions.

THE EARLY LAW WRITERS ON THE MEANING OF "LAW."

"Every law may be said to consist of several parts: One declaratory, whereby the right to be observed, and the wrong to be eschewed, are *clearly defined* and laid down."

Blackstone in his Introduction, Book 1, p. 53.

Although there is much in Montesquieu's "Spirit of the Laws" that we have outgrown, yet he was the precursor of most that is good in modern political institutions, and, as it appears by the frequent references to him in The Federalist,

his book did much to shape our own constitution. It is nearly two centuries since he wrote:

"Under moderate governments, the law is prudent in all its parts, and *perfectly well known,* so that even the pettiest magistrates are capable of following it. But in a despotic state, when the prince's will is the law; though the prince were wise, yet how could the magistrate follow a will he does not know? He must certainly follow his own. [p. 79.] In despotic governments there are no laws, the judge himself is his own rule. [p. 92.]"

V. 1, "Spirit of the Law." Pages are from the Aldine Ed.

The following words, also from Montesquieu, show what the contest for certainty of the law meant with special reference to intellectual crimes, and with a very few verbal changes, will be seen to bear with unusual force against the validity of our present obscenity laws. He said: "Nothing renders the crime of high treason, [and we may add obscenity,] more arbitrary than declaring people guilty of it for indiscreet speeches. Speech is so subject to interpretation; there is so great a difference between indiscretion and malice; and frequently little is there of the latter in the freedom of expression, that the law can hardly subject people to a capital punishment for words *unless it expressly declares what words they are.* Words do not constitute an overt act; they remain only in idea. When considered by themselves, they have generally no determinate signification, for this depends on the tone in which they are uttered. It often happens that in repeating the same words they have not the same meaning; this depends on their connection with other things, and sometimes more is signified by silence then by any expression whatever. *Since there can be nothing so equivocal and ambiguous as all this, how is it possible to convert it into a crime of high treason? Wherever this law is established, there is an end not only of liberty, but even of its very shadow.*"

The Spirit of the Law, v. 1, p. 232, Aldine Edition.

Beccaria, who profited by studying Montesquieu, also elaborates this theme of the necessity of certainty of law as a condition of liberty. In part he wrote as follows:

"Judges, in criminal cases, have no right to interpret the penal laws, because they are not legislators. They have not received the laws from our ancestors as a domestic tradition, or as the will of a testator, which his heirs, and executors, are to

obey; but they receive them from a society actually existing, or from the sovereign, its representative. * * * There is nothing more dangerous than the common axiom; the spirit of the laws is to be considered. To adopt it is to give way to the torrent of opinions. This may seem a paradox to vulgar minds, which are more strongly affected by the smallest disorder before their eyes, than by the most pernicious, though remote, consequence produced by one false principle adopted by a nation. *When the rule of right which ought to direct the actions of the philosopher, as well as the ignorant, is a matter of controversy, not of fact, the people are slaves to the magistrate. If the power of interpreting laws be an evil, obscurity in them must be another, as the former is the consequence of the latter.* This evil will be still greater, if the laws be written in a language unknown to the people; who, being ignorant of the consequences of their own actions, *become necessarily dependent on a few, who are interpreters of the laws, which instead of being public, and general, are thus rendered private and particular.* If this magistrate should act in an arbitrary manner, and not in conformity to the code of laws, which ought to be in the hands of every member of the community, he opens a door to tyranny, which always surrounds the confines of political liberty. *I do not know of any exception to this general axiom, that every member of society should know when he is criminal, and when innocent.* If censors, and, in general, arbitrary, magistrates, be necessary in any government, it proceeds from some fault in the constitution. *The uncertainty of crimes hath sacrificed more victims to secret tyranny, than have ever suffered by public and solemn cruelty.*"

"No Magistrate then (as he is one of the society) can, with justice, inflict on any other member of the same society,—*punishment that is not ordained by law. Judges in criminal cases have no right to interpret the penal laws because they* are not legislators. Who then is their lawful interpreter? The sovereign that is the representative of society, *and not the judge, whose office is only to examine if a man have or have not committed an action contrary to the law.*"

An Essay on Crimes and their Punishment. (Edition of 1775) pp. 12-41.

An American commentator writing before the Revolution defines "The law of the land" to mean by the common law or by the statute law, by the due course and process of law."

He quotes *Lord Coke* as thus interpreting the clause in question, "the law is the surest sanctuary that a man can take, and the strongest fortress to protect the weakest of all. * * * No man is deceived while the law is his buckler. * * * The law is called right because it discovereth that which is crooked or wrong; for as right signifieth law, so crooked or wrong signifieth injuries; injury is against right. A right line is both declaratory of itself and the oblique. *Hereby the crooked chord of that which is called discretion, appeareth to be unlawful*, unless you take it as it ought to be, *discreti est discerne per legam, quid sit justum*—discretion is to discern by the law what is just."

English Liberties, by Henry Carr and William Nelson, pp. 21 to 27. (Providence, R. I., 1774.)

2 Coke's Institutes, marginal page 56.

"It is the function of a judge not to make but to declare the law according to the golden metewand of the law, and not by the crooked cord of discretion." Coke.

It must be apparent from this conception of "law" that under "due process of law" as used in the English charters and defined before the days of our constitution, and with such interpretation incorporated into these constitutions, no man can be deprived of property or liberty for acts made criminal, by any exercise of power, which seeks to invest either Judges or juries, either directly or indirectly, with a discretion to determine whether or not any undisputed act shall be penalized but on the contrary the very essence of "*law*" in "due process of law," in criminal cases at least, is that *all such discretion shall be destroyed by the very explicitness of the law itself*, and that all juridical discretion shall be limited to discovering the facts and discerning solely from the letter of the law, whether these ascertained facts constitute a crime. Only thus can statutes curb the tyranny of arbitrary judicial power. Here is another authoratative statement as to the requirement of the law, which again is a prerevolutionary authority, in the light of which our constitutional phrase must have been adopted.

"It is further essential to political freedom *that the laws be clearly obvious to common understanding*, and fully notified to the people. * * * When the people first learn the law by fatal experience, they feel as if the judge was in effect legislator, and as if life and liberty were subjected to arbitrary

control. * * * *The same will be the consequences, where the law is imperfectly and indefinitly expressed.* The style thereof should be clear, and as concise as is consistent with clearness; general terms also should be particularly avoided, as liable to become the instruments of oppression. Under the Act 14 Geo. 11 c. 6, stealing sheep *'Or other cattle,'* was made felony without benefit of clergy; but those general words 'or other cattle' being considered as too vague to create a capital offence, the act was properly holden to extend only to sheep."

Lord Auckland's, Principles of Penal Law. p. 312-314 (1771).

That judicial interpretation of "Law" was adopted into our constitutional guarantee of "Due Process of law" and measured by that standard, all uncertain criminal statutes must be annulled because not "*Law*" and not constituting "due process of law."

In the debates of the English Parliament frequent references could be found in which certainty of the law is advocated. (See 4 Parliamentary History, pp. 115-117-118 for illustrations) In 1792 (Stat. 32 Geo. III, c. 60) was passed the act which in cases of criminal libel made the jury the judge of both law and fact. Before this (in 1784) an English court denounced uncertainty of the law of libels or its administration in no uncertain terms. Here is the language officially reported.

"Miserable is the condition of individuals, dangerous is the condition of the state, if there is *no certain law*, (or which is the same thing) no certain administration of law, to protect individuals or to guard the state. * * * Under such an administration of the law *no man could tell, no counsel could advise, whether a paper were or were not punishable.. I am glad that I am not bound to subscribe to such an absurdity, such a solecism in politics.*"

King v. Dean of St. Asaph, 3 Terms Rep. 431. (1784)

If the English courts have not so uniformly ignored uncertain statutes as might be desired, the explanation may perhaps be found in the fact that Magna Charta is a limitation only upon the soverign, and not upon Parliament, in the sense in which our American constitutions operate to limit legislative power. If therefore English courts, because of uncertainty, are to annul an enactment of Parliament, the justification therefore could be found only in the very nature of their

institutions, without any fundamental written authority making such natural law a limitation upon legislative power.

THE MAXIM REQUIRING CERTAINTY.

From such solicitude for that liberty which ever depends upon the certainty of meaning in the criminal statute came the ancient maxim: "Ubi jus incertum, ibi jus nullum—where the law is uncertain, there is no law."

Black's Law Dictionary, p. 1196.

Bouvier's Law Dictionary, Rawl's Revision v. 2, p. 381.

Here it is important that we examine a little farther into the importance of maxims in general and this last one quoted in particular; "All great judges and writers have been led by maxims. * * * Where the maxims lead and illumine the great ends of jurisprudence have been advanced; constitutions and their implications have been respected. Judges who understand, respect and cite maxims, save great principles from clouds of doubt and miserable equivocation. * * * Nothing more greatly obstructs usurpation-abuse of power-and arbitrariness in its edicts than do maxims. * * * All of the admittedly authentic maxims are expressions of mercy, reason and moderation, and are often highly Christian in spirit and suggestion. Lovers of liberty consecrate the maxims, oppressors desecrate them * * * Maxims are the condensed good sense of all nations. They are the essence of wisdom in all ages. Whenever the law is the perfection of reason, they are not excluded but they must necessarily be included. Jurisprudence can lay claim to no other element so lustrous, so illuminating and attractive, as its great fundamental maxims."

Hughes on Procedure v. 2, pp. 1003-1007.

Coke on Littleton, 11, a, (marginal).

Upon the subject of the particular maxim with which we are now concerned, namely "where the law is uncertain there is no law," Mr. Hughes, among other things, has this to say, all of which is applicable to our present judicially enacted tests of the "obscene, indecent, filthy and disgusting" literature and art.

"Where the rule is alternating, as antipathy and affection, caprice or whim dictates, there is no law. And so it is where for one the foundation for a judgment must be one kind of matter, and for another, a different. Where for one there

must be allegations and proofs and for another anything, even palpably sham and false statements."

Concerning jurisprudence, he says: "Its value depends on a fixed and uniform rule of action. * * * If water at one time would extinguish fire and at another would spread a conflagration; if on one day it would bring life and the next death, its value would be destroyed. * * * And so it is in language, when words have no fixed meaning. * * * Those who rule in disregard of obligation and reason, may be likened to the sailor who bores a hole in the ship, upon which the safety of all depends."

Hughes on Procedure, v. 2 p. 1237.

POST REVOLUTIONARY DISCUSSION ON REQUIREMENTS OF THE LAW.

Alexander Hamilton in discussing this subject, among other things, wrote: "I agree [with Montesquieu] that there is no liberty if the power of judging be not separated from the legislative and executive powers. [p. 484.] *To avoid an arbitrary discretion in the courts*, it is indispensable that they should be bound down by strict rules and precedents, *which serve to define and point out their duty in every particular case* that comes before them; * * * The creation of crimes after the commission of the fact, or, in other words, the subjecting of men to punishment for things which when they were done, were breaches of no law [or could not have been ascertained to be such because of the uncertainty of the statute]; and the practice of arbitrary imprisonment have been in all ages the favorite and most formidable instruments of tyranny. [p. 490.] The courts must declare the sense of the law; and if they should be disposed to exercise will instead of judgment, the consequence would equally be the substitution of their pleasure to that of the legislative body." [p. 487.]

Hamilton in "The Federalist," pages as indicated above.

"It is law which has hitherto been regarded in countries calling themselves civilized, as the standard, by which to measure all offences and irregularities that fall under public animaversion. * * * It [the law] has been recommended as 'affording information to the different members of the community respecting the principles which will be adopted in deciding upon their actions. It has been represented as the

highest degree of inequity to try men by ex post facto law, or indeed in any other manner than by the letter of a law, formally made and sufficiently promulgated.' "

2 Godwin's Political Justice, p. 289. (A. D., 1796.)

Prof. Thomas Cooper quotes with approval the following words of Richard Carlyle (about A. D., 1820), which have as direct and certain applications to the uncertain meaning of "obscene" as to the uncertainty about the meaning of "blasphemy" or "Christianity." Carlyle wrote: "No one can understand what is meant by blasphemous publications, or by Christianity: and, what no one can understand, no law can justly take cognizance of, or support."

Laws of Libel and Liberty of the Press, p. 157.

In 1884 Sir Fitz-James Stephens, of the court of King's Bench, seems almost to agree with Carlyle. In the course of an argument for the repeal of all statutes against blasphemy, which he refers to as "an admitted blemish in the existing law," and as "essentially and fundamentally bad," he points out the irreconcilable conflict in the various judicial tests of guilt in blasphemy prosecutions, and reducing the uncertainty of some of these to an absurdity, he describes them "as destitute of that manly simplicity which ought to be the characteristics of the law. There is no reason why the law should be so indistinct."

See, "Blasphemy and Blasphemous Libel," 41 *Fortnightly Review*, 289-314, March, 1884.

Unfortunately in England there is no constitutional limitation upon the power of Parliament such as would preclude the enactment of uncertain laws. What Sir Fitz-James Stephens contends for as a matter of wisdom to be acted upon by the Parliament, in America is a constitutionally guaranteed right.

Edward Livingston, a U. S. Senator, Secretary of State under Pres. Jackson, and Minister to France, reputed to be one of the greatest American lawyers of his time, in 1822 wrote these words: "This dreadful list of Judicial cruelties was increased by legislation of the judges who declared acts which were not criminal under the letters of the law, to be punishable by reason of its spirit. The statute gave the text and the tribunals wrote the commentary in letters of blood, and extended its penalties by the creation of constructive offenses. *The vague, and sometimes unintelligible language,* em-

ployed in the penal statutes, gave a color of necessity to this assumption of power, and the English nation have submitted to the legislation of its courts, and seen their fellow subjects hanged for constructive felonies, quartered for constructive treason, and roasted alive for constructive heresies, with a patience that would be astonishing, even if their written laws had sanctioned the butchery. *The first constructive extension of a penal statute beyond its letter, is an ex post facto law, as regards the offense to which it is applied, and is an illegal assumption of legislative power, so far as it establishes a rule for further decisions.* In our republic where the different departments of government are constitutionally forbidden to interfere with each other's functions, the exercise of this power would be particularly dangerous. * * * It may be proper to observe that the fear of *these consequences is not ideal, and that the decisions of all tribunals under the common law, justify the belief that without some legislative restraint our courts would not be more scrupulous than those of other countries, in sanctioning this dangerous abuse.* [p. 17-18]. It is better that acts of an evil tendency, should for a time be done with impunity than that courts should assume legislative powers, which assumption is itself an act more injurious than any it may purport to repress. There are therefore no constructive offenses. [p. 118.] *Penal laws should be written in plain language, clearly and unequivocally expressed, that they may neither be misunderstood or perverted.* * * * The accused in all cases should be entitled to a public trial, conducted by known rules," etc. (p. 113).

"Report made to the General Assembly of the State of Louisiana on the plan of a Penal Code," by Edward Livingston, at pages as indicated in the text.

At the time when Livingston wrote, Puritan prudery had scarcely made a beginning toward its legalization. Under the common law of England before the revolution "obscenity" in literature had only been punished when it was incidental to treasonable or blasphemous utterances. Some American judges, with that peculiar intellectual capacity which enables them without research to determine historical facts of the past on the mere testimony of their inner consciousness have often asserted the contrary, but the fact remains that prior to the Revolution there is no recorded case of punishment for an obscene libel wherein the obscenity of the publication, merely as

such obscenity and disassociated from treason and blasphemy, was ever punished.

"Obscene Literature under the Common Law." *Albany Law Journal,* May, 1907.

Notwithstanding the total absence of such precedents as now justify the outrage of suppressing the human nude in art, and even the scientific discussion of sex problems, and the further fact that at his time sexual psychology was not yet thought of, and could give no information such as we now have to prove the uncertainty or nature of our conception of the "obscene and indecent," yet Edward Livingston's keen intellect foresaw the danger, merely as an incident of the uncertainty which attaches to ethical sentimentalizing and its verbal vagueness. In about 1820 he wrote to M. Duponceau a very distinguished lawyer of his time as follows:

"I am in a difficulty, and as it is one arising out of a question of jurisprudence, I know no one to whom I can apply for assistance, with so sure a hope of relief, as from you. In the revision of my criminal code, I have now under consideration the chapter of offenses against public morals. This is intended to comprehend all that class which the English jurists have vaguely designated as offences contra bonos mores, finding it much easier in this, as they do in many other cases, to give a Latin phrase, which may mean anything, rather than a definition. I have serious thoughts of omitting it altogether, and leaving the whole class of indecencies to the correction of public opinion. I have been led to this inclination of mind (for as yet I have formed no decision) from the examination of the particular acts which in practice have been brought under the purview of this branch of criminal jurisprudence. In the absence of anything like principle or definition, I was obliged to have recourse to not only precedent, but to the books of precedents, and they strongly reminded me of some forms which I have seen in Catholic church books, of questions which are to be put to the penitent by the professor, in which every abomination that could enter into the imagination of a monk is detailed, in order to keep the mind of a girl of fifteen free from pollution! Turn to any indictment of this kind in the books, for the publication of obscene books or prints, or for indecency of behavior, and you will find the innuendos and exposition of the offence infinitely more indecorous, more open violation of decency, than any of the works they are intended

to punish and repress. The evidence must be of the same nature, and hundreds will hear the trial who never would have seen the book or print. The evil is inevitable, if such acts are punished by law.

"There is another evil of no less magnitude, arising from the difficulty of defining the offence. Use the general expression of the English law, and a fanatic judge, with a like-minded jury, will bring every harmless levity under the lash of the law. Sculpture and painting will be banished for their nudities, poetry for the warmth of its description, and music, if it excite any forbidden passion, will scarcely escape.

"On the whole, I am surrounded by difficulties. Help me to a definition that shall include what ought to be punished, and not give room for the abuse I have pointed out. Let me know how I shall decently accuse and try a man for indecency, or else fortify me in my opinion of letting public opinion protect public morals."

"Life of Edw. Livingston," by Charles Havens Hunt, p. 289, N. Y., 1864.

It was a keen mind which could thus foresee what is now being done. His demand, for a definition which defines, is still unanswered.

IN CONCLUSION.

Thus far we have examined the statements of those persons without whose warfare against tyranny we would to-day enjoy less liberty than is permitted us. We have everywhere found that the necessity for law arises from the fact of everyday experience that frail human beings cannot lose their weakness by receiving judicial office, and that because of this, we must submit to the penalties which may be determined by whim, caprice, prejudice, moral idiosyncrasies and sentimentalism, or even malice, unless the judge's will is always held in subjection to the same law which is designed to warn all others and restrains the conduct to be punished. We have also seen that it was the desire to achieve this result, which prompted the demand for the English Charters of liberty, and we know the terrible havoc which has resulted from the neglect of this requirement that the laws should be certain. Furthermore we have seen how the judge who insisted on the charter-rights, refused to enforce, except as to sheep, a statute penalizing the

theft of sheep "or other cattle" because the word "cattle" was too vague, and since it required judicial legislation to make it certain it could not be "the law of the land." It was after that construction of "law," and with it, that we adopted our constitutions guaranteeing "Due Process of Law."

I therefore conclude that the historical interpretation of the word "law," is in accord with its significance as derived from a study of its essential nature (see first essay herein), and that among other qualities which must inhere in every penal statute, in the absence of which it cannot be *"the law,"* nor constitute "due process of law" is that of certainty in the description of the conduct penalized. In other words, according to the historical interpretation of "law," "No penal law can be sustained unless its mandates are so clearly expressed that any ordinary person can determine in advance what he may or may not do under it," and by that test all statutes against "obscene, indecent, filthy or disgusting" literature and art, and a large number of other statutes similarly vague, fail to constitute "Due Process of Law."

CERTAINTY REQUIRED BY MODERN AUTHORITIES.

The modern authorities are quite as definite as the older ones in insisting upon absolute certainty in the definition of that which is penalized. This makes it all the more surprising that no one has thought to apply the rule of these cases for the destruction of the innumerable prosecutions under statutes equally as uncertain as those against "obscenity." The rule by which such statutes must all be annulled is this: that every statute penal in character is void for uncertainty unless the prohibited conduct and criteria of guilt, are defined in the statute by words so fixed and certain in meaning as to leave no reasonable doubt, or difference of opinion, in the minds of any man of ordinary intelligence as to what is prohibited, or as to the consequence of applying the statutory criteria of guilt to every given state of facts. If the statutory test of criminality is uncertain, and therefore left to be judicially supplied, so that in any case, or any considered number of cases, a uniform conclusion is not unavoidably reached by different courts acting upon the same state of facts, which uniformity must be reached solely by accurate, unavoidable and uniform deduction made from the statutory tests of criminality (not by tests which are judicially created), then the statute is a nullity.

These principles are plain enough and whenever applied to laws as uncertain, for example, as those against "obscene" literature and art, the application must result in their being declared unconstitutional, because not "law" nor "due process of law." No court has yet been asked to so apply these rules to statutes against "obscene" literature, and yet, in several cases the judges on their own motion seem to have come very near to their annullment. These opinions will be quoted later when we come to suggest some applications of the principle under discussion.

With these few words of introduction we will proceed to a mere compilation of authoritative utterances bearing upon the

requirement of statutory certainty. Most of these quotations are from cases construing punitive statutes. In others, however, we find the principle definitely applied to the end of declaring uncertain statutes to be unconstitutional. First will be collected some of the authorities which show that the historical interpretation of "law," which requires certainty in the meaning of penal statutes before they can constitute "law," was perpetuated by our constitutional guarantees of "Due Process of Law." After that will be quoted some judicial opinions which specifically declare that the destruction of all arbitrariness of courts, by the certainty of meaning in the statutory statement of the criteria of guilt, is a prerequisite without which penal statutes do not furnish "Due Process of Law."

For the benefit of the lazy and the very busy man, I violate my ideals of what a legal argument ought to be and pursue the method of merely compiling quotations from judicial opinions, which are deemed more or less material to the contention which I am making. If I merely cited the opinions instead of quoting them, I fear not many of them would be read.

THE HISTORICAL AND SCIENTIFIC INTERPRETATION OF "LAW" IS PERPETUATED BY OUR CONSTITUTIONS.

In reading the following quotations it is necessary always to bear in mind that the "settled maxims"—"the principles which were before the constitutions"—"the ancient rights and liberties of the subject," from the time of *Magna Charta* down, always included the protection of those accused of crime, by insistance upon the maxim *"Ubi jus incertum, ibi jus nullum,"* (where the law is uncertain there is no law).

"Due process of law" means "an exercise of the powers of government *as the settled maxims of the law permit* and sanction, under such safeguards as these maxims prescribe for the class of cases to which the one in question belongs."

State v. Board of Med. Exams. 34 Minn. 387-389, Meyer's Vested Rights, p. 196.

"Even in judicial proceedings we do not ascertain from the constitution what is lawful process but we must test their action by *principles which were before the constitution* and the benefit of which we assume that the constitution was intended to perpetuate."

Weimer v. Bunbury, 30 Mich., 301 (213).

State v. Doherty, 60 Me., 504.

"These phrases [of the Constitution] did not mean merciful nor even just laws but they did mean equal and general laws, *fixed and certain.* * * * The English colonies in America were familiar with the conflict between customary law and arbitrary prerogative and claimed the protection of these charters. When they came to form independent governments, they sought *to guard against arbitrary* and unequal governmental action by inserting the same phrase in their constitutions. * * * It does not follow that every statute is 'the law of the land,' nor that every process authorized by a legislature is 'due process of law.'"

Eames v. Savage, 77 Me., 212 (220, 221), 1885. Meyer's Vested Rights, p. 192.

"No man shall be arrested, imprisoned or exiled or deprived of his life, liberty or estate, but by the judgment of his peers, or the law of the land, is so manifestly conformable to the words of *Magna Charta,* that we are not to consider it as a newly invented phrase, first used by the makers of our constitution, but we are to look at it as the adoption of one of the greatest securities of private right, handed down to us among the liberties and privileges which our ancestors enjoyed at the time of their emigration, and claimed to hold and retain as their birth right. These terms, in this connection, cannot, we think, be used in their most bold and literal sense, to mean the law of the land at the time of the trial, because the laws may be shaped and altered by the legislature from time to time; and such a provision, intended to prohibit the making of any law impairing *the ancient rights and liberties* of the subject, would under such a construction be wholly nugatory and void. The legislature might simply change the law by statute, and thus remove the landmark and barrier intended to be set up by this provision in the bill of rights. It must therefore have intended the ancient established law and course of legal proceedings, by an adherence to which our ancestors in England, before the settlement of this country, and the emigrants themselves and their descendants, had found safety for their personal rights."

Jones v. Robbins, 8 Gray (74 Mass.), 329 (342, 343), Meyer's Vested Rights, 195.

This would include the requirement of certainty in tests of guilt, as laid down by Coke, Blackstone and others, as quoted in the "Historic Interpretation of 'Law,'" and the maxim, "where the law is uncertain there is no law."

"By 'due process of law' is meant such general and legal forms and course of proceeding as were known either at common law or were generally recognized at the time of the adoption of the provision."

Gibson v. Mason, 5 Nev., 283 (302).

McCarrol v. Weeks, 5 Hayw. (Tenn.), 246.

"The words 'due process of law,' were undoubtedly intended to convey the same meaning as the words 'by the law of the land' in *Magna Charta*. Lord Coke in his commentary on these words (2 Inst., 50) says they mean due process of law. It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative as well as the executive and judicial powers of the government, and cannot be so construed as to leave congress free to make any process "due process of law,' by its mere will. We must look to those settled usages and modes of proceedings existing in the common and statute law of England, before the emigration of our ancestors and which are shown not to have been unsuited to their civil and political conditions, by having been acted on by them after the settlement of this country."

Murry v. Hoboken, etc., 18 How., 272 (276), (U. S., 1855).

Davidson v. New Orleans, 96 U. S., 97 (1877).

These authorities sufficiently show that the Federal and State constitutions guaranteeing "Due Process of Law," adopted the conception of "Law" which requires from the law making power an absolute certainty in the statement of its criteria of guilt, before a penal statute is *the law* of the land. This still further vindicates the historical interpretation of "law" as herein before made, and aids us to resurrect, and revivify the ancient maxim, "Where the law is uncertain there is no law." It is hoped that thus may be destroyed all those tyrannous laws, whose meanings no one knows until after trial, and as to which no lawyer can advise, because they are born of a stupid moral sentimentalism, by those whose dense ignorance of the meaning of law and liberty is evidenced in the fact that mere question-begging vituperative epithets, so often expressing only diseased emotions, supplant the necessary statutory definitions of that which is prohibited. Next we will examine the judicial utterances in so far as they may bear upon the required certainty in statute law.

These disquisitions were primarily designed to discuss the requirement of certainty in penal statutes. In the foregoing essays it seemed necessary to the clarification of our thinking to point out how and why certainty is equally a requisite of those statutes which seek to do something else than merely to declare and enforce natural justice. As confirming that part of my speculations which asserts that "law" presupposes the abolition of all arbitrary power such as unavoidably results from the enforcement of uncertain statutes, as well as to emphasize the importance of the maxim, "Where the law is uncertain there is no law," a few opinions of civil cases will be quoted, in which the principle of the maxim is applied to non-penal statutes.

"It is impossible for a man to regulate his conduct by a rule that has no existence; it therefore follows of necessity that laws can only influence the conduct of men after they are made."

Davis v. Ballard, 1 Marshall (Ky.), 577.

"An act may be passed and published by legislatures national, state and territorial, with all the usual formalities and appendages, and yet pronounced no law when put to the judicial test. * * * Strip this act of its outside appendages, leave it solitary and alone, is it possible for any human being to tell by what authority the seat of Government of Washington Territory was to be removed from Olympia to Vancouver?" (On the implied negative the legisltaive act was annulled.)

Seat of Government Case, 1 Wash. Ter. Rep., 123.

"The word equity in the oath administered to the special jury, is synonymous with *law, and does not mean some undefined and undefinable notion which the jury may entertain of the justice of the case,* but a system of jurisprudence governed by established rules and bound down by fixed precedents. The special jury is sworn to try the cause according to equity and the opinion they entertain of the evidence, and not their opinion of equity, as well as the evidences."

Thornton v. Lane, 11 Ga., 461-538.

"Every duty becomes such because the law makes it so. It is fixed and certain. *Unless fixed and certain it cannot be a duty,*" said in civil action for damages from negligence.

Evansville St. Ry. Co. v. Meadows, 13 Ind. App. Ct., 159.

"*Unless then the description* [in an act of Congress] *is so clear and accurate* as to refer to a particular patent [or unerringly describe the characteristics which make the book obscene' so] *as to be incapable of being applied to any other the mistake is fatal.*"

Blanchard v. Sprague, Fed. Case 1517, v. 3, p. 647, and cases.

"We cannot make the language for the law-making power when the means of construing the language used, in any other than its literal and grammatical sense, is not furnished by the act itself or unmistakably indicated by the circumstances. * * * It [the legislative act] is *void* because it cannot be ascertained from its terms, with any reasonable certainty what territory is assigned to Dallas County."

Bittle v. Stuart, 34 Ark., 229-232.

See also, Ferrett v. Attwill, 1 Blatchford, 157.

Henry v. Evans, 97 Mo., 47.

These decisions sufficiently demonstrate that as to those civil and political statutes which create or enforce artificial rights, it is unavoidable that we apply the old maxim, "Where the law is uncertain there is no law," or else submit to the arbitrary tyranny of judicial legislation.

THE TEXT-BOOK WRITERS ON CERTAINTY IN PENAL STATUTES.

"The penal law is intended to regulate the conduct of people of all grades of intelligence within the scope of responsibility. It is therefore essential to its justice and humanity that it be expressed in language which they can easily comprehend, *that it be held obligatory only in the sense in which all can understand it,* and this consideration presses with increasing weight according to the severity of the penalty. Hence every provision affecting any element of a criminal offence involving life or liberty is subject to the strictest interpretation. * * * It is the legislature, not the court, which is to define a crime and ordain its punishment."

Sutherland, Statutory Construction, 1st Ed., p. 438-9.

Under "Due Process of Law" Ordronaux says: "Every enactment is not necessarily 'the law of the land.' * * * The phrase means * * * judgment rendered under and according to *a general system of law* which the community has

established for the protection of the civil rights of all its members."

Ordronaux's Constitutional Legislation (1891), p. 255.

I have made no investigation of English decisions, but chanced to run upon the following expression which I have thought best to preserve by inserting it here, though it will add a little to the disorderly character of the compilation of this chapter.

"It would be extremely wrong that a man should, by a long train of conclusions, be reasoned into a penalty when the express words of the act of Parliament do not authorize it."

Rex v. Bond, 1 B. and Ald. at page 392.

THE STATE COURTS.

"All must have the equal protection of the law and its instrumentalities. The same rule must exist for all in the same circumstances," (which cannot be the same if the criterion of guilt is uncertain, as it must be where left for judicial creation).

Chic. St. L. & R. v. Moss, 60 Miss., 641-647.

Pearson v. Portland, 69 Me., 278.

"Words cannot be imported into a statute for the purpose of construing it."

State v. Payne, 29 Pac. Rep., 787.

"The office of interpretation is to bring sense out of the words, not to bring a sense into them."

McClusky v. Cromwell, 11 N. Y. (1 Kern), 593 (602).

All the judicial "tests of obscenity" violate these rules of construction. All such tests are in fact interpolated by unauthorized and unconstitutional, judicial legislation, and vary according to the exigencies of each case and the moral idiosyncracies of each judge.

"By the 'Law of the Land' is meant, *not the arbitrary edict of any body of men,* not an act of assembly, though it may have all the outward form of law, but due process of law."

Palairet's Appeal, 67 Penn. St., 479 (485). Meyer's Vested Rights, 196.

"*The rights of every individual must stand or fall by the same rule of law that governs every other member of the community under similar circumstances*, and every partial or pri-

vate law which directly proposes to destroy or effect individual rights, or does the same thing *by affording remedies leading to similar consequences,* is void."

Wally's Heirs v. Kennedy, 2 Yerg., 554 (555).
Bank of the State v. Cooper, 2 Yerg., 599.

"Under the requirement of due process of law, the law must provide some just form or mode in which the duty of the citizen shall be determined before he can be visited with a penalty for non-performance of an alleged duty" (which is not done if criteria of guilt are left uncertain, and consequently to be supplied by the court).

Philadelphia v. Scott, 81 Penn. St., 80 (90).
Craig v. Kline, 65 Penn. St., 399.

"Due process of law is a general expression and is equivalent to the 'law of the land.' It permits the deprivation of life, liberty or property according to law, not otherwise. *It shields such right from arbitrary power.* Due process of law, in a [criminal] case like this, *requires a law describing the offense.* The definition of the offense, and the authority for every step of the trial must be found in the law of the land. Nothing essential can emanate from arbitrary power."

State v. Bates, 14 Utah, 293 (300).

"These uncertainties [arising from a statute] as to whether a man would be subject to fine or imprisonment, are not the qualities of law, but rather the qualities of anarchy. * * * That laws shall exist which are not plainly in exact words prescribed, so that an individual may know them, which are not passed by the deliberation of the three legislative departments, each member in each branch sworn to exercise his best judgment for the people upon his own responsibility, is directly opposed to every principle of the American or any good government."

Thornton v. Ter. of Wash., 3 Wash. Ter. Rep., 488-494.

(The judicially prescribed and ever varying "tests of obscenity" never had the endorsement of any branch of any legislature.)

"The clause 'law of the land' was defined in our earlier cases to mean 'a general and public law, equally binding upon every member of the community;' but by our later cases it is

defined to mean a law 'which embraces all persons who are or may come into like situation and circumstances."

Stratton Claim v. Morris Claim, 89 Tenn. 521, cases.

Harbison v. Knoxville Iron Co., 103 Tenn., 434.

If the criteria of guilt are left for judicial creation *the law* does not uniformly embrace all persons who may come into like situation.

"It is obvious there can be no certain remedy in the laws where the legislature [or courts in criminal cases] may prescribe one rule for one suitor or a class of suitors in the courts, and another for all others under like circumstances, or may discriminate between parties to the same suit."

Durkee v. Janesville, 28 Wisc., 464 (471).

The city council of Hagerstown, Md., had been authorized to pass ordinances "to prevent nuisances and to regulate and control offensive trades" and passed an ordinance prohibiting the herding and keeping of domestic animals "without permit therefore first had and obtained from the mayor and council," but no general rules were prescribed which would control the granting of such permits. The defendant was arrested for violating the ordinance. The ordinance was attacked among other reasons for this, that "it places unreasonable, arbitrary, and oppressive power in the hand of the mayor and council."

The court said: "In re Christensen (C. C.) 43 Fed. 243, it is said: 'The fact that it *permits* arbitrary discriminations and abuses in its execution, depending upon no conditions or qualifications whatever other than the unregulated arbitrary will of certain designated persons, is the touch-stone by which its validity is to be tested.' In Cicero Lumber Co. v. Cicero 176 Ill. 9, 51 N. E. 758, 42 L. R. A. 705, 68 Am. St. Rep. 155 in a well considered case says: 'The ordinance in so far as it invests the Board of Trustees with the discretion here indicated is unreasonable. It prohibits that which is in itself and as a general thing lawful and leaves the power of permitting or forbidding the use of traffic teams upon the boulevards to an unregulated official discretion, when the whole matter should be regulated by permanent local provisions operating generally and impartially * * * The ordinance in no way regulates or controls the discretion thereby vested in the Board. It prescribes no conditions upon which the special permission of the Board is to be granted. Thus the Board is clothed with the

right to grant the privilege to some and to deny it to others. Ordinances which thus invest a city council or board of trustees with a discretion which is purely arbitrary and *which may be* exercised in the interest of a favorite few, are unreasonable and invalid. The ordinance should have established a rule by which its impartial enforcement could be secured.'" Citing

Mayor v. Radecke, 49 Md. 230, 33 Am. Rep. 239.

Bostock v. Sams, 95 Md. 400, 52 Atl. 665, 59 L. R. A. 282, 93 A. S. R. 394.

Cov. Stockyards v. Keith, 139 U. S. 128, 11 Sup. Ct. 461, 35 L. Ed. 73.

Crowley v. Christensen, 137 U. S. 89, 11 Sup. Ct. 13, 34 L. Ed. 620.

"We hold the ordinance here in question to be invalid and contrary to law."

Mayor, etc. v. B. & O. R. R. Co., 68 Atl. Rep. 490.

"It has been wisely and aptly said that this is a *government of laws and not of men;* that there is *no arbitrary power* located in any individual or body of individuals; but that all in authority are guided and limited by those provisions which the people have, through the organic law, declared shall be the measure and scope of all control exercised over them."

FEDERAL COURTS.

"A court is not however permitted to arrive at this [Legislative] intention by mere conjecture, but it is to collect it from the object which the Legislature had in view and the expressions used, which should be competent and proper to apprise the community at large of the rule which it is intended to prescribe for their government. For although ignorance of the existence of a law be no excuse for its violation, yet if this ignorance be the consequence of an ambiguous or obscure phraseology some indulgence is due to it. *It should be a principle of every criminal code, and certainly belongs to ours, that no person be adjudged guilty of an offense unless it be created and promulgated in terms which leave no reasonable doubt of their meaning.* * * * A court has no option where any considerable ambiguity arises on a penal statute, but is bound to decide in favor of the party accused. 'It is more consonant with the principles of liberty,' says an eminent English judge, 'that a court should acquit when the Legislature intended to

punish, than that it should punish when it was the intent to discharge with impunity.' If no sense can be discovered in them [the words used in the statute] as they are here introduced, the court had better pass them by as unintelligible and useless, than to put on them, at great uncertainty, a very harsh signification and one which the Legislature may never have designed."

Enterprize, Fed. Case No. 4499, Vol. 8, p. 734-5.

Here we may adapt to new uses the words of Chief Justice Best, in Fletcher v. Lord Sondes, 3 Bing., 580. He says: "If this rule is violated, the fate of the accused person is decided by the arbitrary discretion of judges and not by the express authority of the laws." * * * "The courts have no power to create offenses but if by a latitudinarian construction they construe cases not provided for to be within legislative enactment, it is manifest that the safety and liberty of the citizen are put in peril, and that the legislative domain has been invaded. * * * *The doctrine is fundamental in English and American law that there can be no constructive offenses; that before a man can be punished, his case must be plainly and unmistakably within the statute;* that if there be any fair doubt whether the statute embraces it, that doubt is to be resolved in favor of the accused. These principles admit of no dispute, and often have been declared by the highest courts, and by no tribunal more clearly than the supreme court of the United States."

U. S. v. Clayton, Fed. Cas. No. 14814, Vol. 25, p. 460.

"*Such an interpretation is not to be adopted* to give effect to particular words, *which will require* on the part of the court, *the introduction of new provisions and auxiliary clauses, which the statute neither points out nor even hints at*, and yet which are indispensible to make such interpretation servicable or practicable."

U. S. v. Bassett, v. 24, Fed. Cases p. 1034, No. 14539.

The rule of this last decision is violated by every one of the judicial "tests of obscenity."

"Penal statutes cannot be extended beyond the OBVIOUS meaning of their terms on any plea of failure of justice."

U. S. v. Garretson, 42 Fed. R., 25.

"Statutes creating crimes will not be extended by judicial interpretation to cases not plainly and unmistakably within their terms. If this rule is lost sight of the courts may hold an

act to be a crime when the Legislature never so intended. * * * The sense of indignation against such vocation or conduct should not permit a violation by the courts of established rules of law, or an unlawful exercise of jurisdiction."

U. S. v. Whittier, Fed. Case No. 16688.

"The words 'by law' in section 967 [U. S. Stat.] are emphatic and refer in my judgment to a *fixed rule* in respect to time and manner, *and not to a discretionary power* vested by statute in a state court."

Meyers v. Tyson, Fed. Case 9995-13 Blatch, 242.

Uncertainty arising from absence of specific standards of judgment necessarily involves the exercise of discretionary power in determining what shall be the essence of guilt.

"A citizen desiring to obey the laws would search the acts of Congress in vain to find that grazing sheep upon a forest reserve without the permit of the Secretary of Agriculture, is a criminal offense. It has been suggested that the acts under which the indictment is drawn give notice that the Secretary may make rules and regulations, and the search would not be complete and the inquiry concluded until it be ascertained whether he has made such rules and regulations, the violation of which it is expressly declared shall be a criminal offense. But here we are led back to a delegation of legislative power. The rules prescribed by the heads of the departments are not necessarily promulgated. While they may be procured, they are not as easily available as are statutes of the United States; nor does our system contemplate an examination of those rules for the ascertainment of that which may or may not be a crime, for *the right to prohibit a given thing under penalty, belongs to Congress alone. * * * It cannot authorize any other branch of the government* [*not even the courts*] *to define that which is purely legislative, and that is purely legislative, which defines rights, permits things to be done, or prohibits the doing thereof.*

U. S. v. Mathews, 146 Fed. Rep. 308.

U. S. v. Eaton, 144 U. S., 687.

"In order to constitute a crime, the act must be one *which the party is able to know in advance whether it is criminal or not. The criminality of an act cannot depend upon whether a jury may think it reasonable or unreasonable.* There must be some definiteness and certainty."

Tozer v. U. S., 52 Fed. Rep., 919.

How can any man know in advance from a mere reading of the statute by what "test of obscenity" the judge or jury will determine the guilt or innocence of his conduct in circulating a book or picture? Of course he can't know and therefore such laws cannot constitute "Due Process of Law."

"No penal law can be sustained unless its mandates are so clearly expressed that *any ordinary person can determine in advance* what he may and what he may not do under it. [citing authorities] Lieb. Herm. 156. In this the author quotes the Chinese Penal Code which reads as follows: 'Whoever is guilty of improper conduct and of such as is contrary to the spirit of the laws, though not a breach of any specific part of it, shall be punished at least forty blows, and when the impropriety is of a serious nature, with eighty blows.' There is very little difference between such statute, and one which would make it a criminal offense to charge more than a reasonable rate." Chicago etc. Railway Co. v. Dey, 35 Fed. Rep. 866-867.

"But to punish a man for a non-performance of a duty, it is not sufficient that the law impliedly requires him to do the act. *The statute must be clear and explicit in its terms, in defining that duty, in order that he may know what he is called upon to do, and what it is his duty to avoid.*"

U. S. v. Dwyer, 56 Fed. Rep. 468.

CERTAINTY REQUIRED BY THE U. S. SUPREME COURT.

The Supreme Court of the United States whenever called upon to express an opinion upon the subject has been uniformly insistant upon the requirement of certainty in the statutory definition of crimes.

"There can be no constructive offences."

U. S. v. Lacher, 134 U. S. 628.

"It is axiomatic that statutes creating and defining crimes cannot be extended by intendment, and that no act, however, wrongful, can be punished under such a statute unless clearly within its terms."

Todd v. U. S., 158 U. S. 282.

Chief Justice Marshall said this:

"The rule that penal laws are to be constructed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of the individuals; and on the plain principles that the power of

punishment is vested in the legislative, not in the judicial department. *It is the legislature, not the court which is to define a crime,* and ordain its punishment. . . . To determine that a case is within the intention of a statute its language must authorize us to say so. It would be dangerous, indeed, to carry the principle that a case which is within the mischief of a statute, is within its provisions so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated. If this principle has ever been recognized in expounding criminal law, it has been in cases of considerable irritation which it would be unsafe to consider as precedents forming a general rule for other cases.

U. S. v. Wiltberger, 5 Wheat. 95.

See also Ferrett v. Atwill, 1 Blatchford 157.

Before this the Supreme Court had said: "The effect of the provision [requiring Due Process of Law] is to secure the individual from the *arbitrary* exercise of the powers of government."

Bank of Columbia v. Oakley, 4 Wheat. 235 (244), Meyer's Vested Rights 196.

"If the language is clear it is conclusive. There can be no construction where there is nothing to construe. The words must not be narrowed to the exclusion of what the legislature intended to embrace, *and they must be such as to leave no reasonable doubt upon the subject.*"

U. S. v. Hartwell, 73 U. S. (6 Wall) 396.

"Laws which prohibit the doing of things, and provide a punishment for their violation should have no double meaning. A citizen should not unnecessarily be placed where, by an honest error in the construction of a penal statute, he may be subjected to a prosecution for a false oath, and an inspector of elections should not be put in jeopardy because he, with equal honesty, entertains an opposite opinion. . . . *If the legislature undertakes to define by statute a new offense and provide for its punishment, it should express its will in language that need not deceive the common mind. Every man should be* able to know with certainty when he is committing a crime. . . . *It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders and leave it to the court to step inside and say who could be rightfully detained, and who should be set at large. This would to some*

extent substitute the Judicial for the legislative department of the government."

U. S. v. Reese 92 U. S. 219, 221; 23 L. 563, 565.

"When we consider the nature and theory of our government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that *they do not mean to leave room for the play and action of purely arbitrary power,"* (such as must result if the statute leaves the test of criminality uncertain).

Yick Wo, v. Hopkins, 118 U. S. 356-359.

"No language is more worthy of frequent and thoughtful consideration than these [foregoing] words of Mr. Justice Mathews."

Gulf C. & S. Fe. Ry. v. Ellis, 165 U. S. 159.

"The words 'due process of law' come to us from England, and their requirements were there designed to secure the subject against the arbitrary action of the crown and place him under the protection of the law. . . . In this country the requirements are intended to have a similar effect against legislative power, that is, to *secure the citizen against any arbitrary deprivation of his rights whether relating to his life, his liberty or his property. . . . The great purpose of the requirements is to exclude everything that is arbitrary and capricious in legislation affecting the rights of the citizens.*

Dent v. West Virginia, 129 U. S. 114.

S. C. Meyer's Vested Rights 195.

Millett v. People, 117 Ill. 294. (1886).

"Laws which create crime ought to be so explicit that all men subject to their penalties may know what acts it is their duty to avoid. U. S. v. Sharp, Pet. C. C. 118, Fed. Case No. 16264."

U. S. v. Brewer, 139 U. S. 288, 11 Sup. Ct. Rep. 538.

U. S. v. New Bedford Bridge Co., Fed. Case No. 15867.

"In the administration of the criminal justice no rule can be applied to one class which is not applicable to all other classes," (which is not insured if the tests of criminality are of judicial creation).

Gibson v. Mississippi, 162 U. S. 591.

"It is all important that a criminal statute should define clearly the offence which it purports to punish, and that when so defined it should be within the limits of the power of the legislative body enacting it."

James v. Bowman, 190 U. S. 127.

Perhaps the lengthiest statement concerning the requirement of certainty in a criminal statute is made by the Court of Appeals of Kentucky, in declaring unconstitutional a statute penalizing transportation companies for charging more than a just and reasonable rate of toll for the transportation of passengers and of freight. In that case the court among other things said this:

"That this statute leaves uncertain what shall be deemed a 'just and reasonable rate of toll or compensation' cannot be denied; and that different juries might reach different conclusions, on the same testimony as to whether or not an offense has been committed, must also be conceded. That criminality of the carrier's act, therefore, depends on the jury's view of the reasonableness of the rate charged, and this latter depends on many uncertain and complicated elements. That the corporation has fixed a rate which it considers will bring it only a fair return for its investment does not alter the nature of the act. Under this statute it is still a crime, though it cannot be known to be such until after an investigation by a jury, and then only in that particular case, as another jury may take a different view, and, holding the rate reasonable, find the same act not to constitute an offense. There is no standard whatever fixed by the statute, or attempted to be fixed by which the carrier may regulate its conduct. And it seems clear to us to be utterly repugnant to our system of laws to punish a person for an act, the criminality of which depends, not on any standard erected by the law, which may be known in advance, but on one erected by a jury; and especially so, as that standard must be as variable and uncertain as the views of different juries may suggest, and as to which nothing can be known until after the commission of the crime.

"If the infliction of the penalties prescribed by the statute would not be the taking of property without due process of law, and in violation of both state and federal constitutions, we are not able to comprehend the force of our organic laws. In Louisville & N. R. Co. v. Railroad Commission of Tennessee, 16 Am. & Eng. R. Cas. 15, a statute very similar to the one under consideration was thus disposed of by the learned judge (Baxter): 'Penalties cannot be thus inflicted at the discretion of a jury. Before the property of a citizen,

natural or corporate, can be thus confiscated, the crime for which the penalty is inflicted must be defined by the law-making power. The legislature cannot delegate this power to a jury. If it can declare it a criminal act for a railroad corporation to take more than a 'fair and just return' on its investments it must, in order to the validity of the law, define with reasonable certainty what would constitute such 'fair and just return.' The act under review does not do this, but leaves it to the jury to supply the omission. No railroad company can possibly anticipate what view a jury may take of the matter, and hence cannot know, in advance of a verdict, whether its charges are lawful or unlawful. One jury may convict for a charge made on a basis of 4 per cent., while another might acquit an accused who had demanded and received at the rate of 6 per cent., rendering the statute, in its practical working, as unequal and unjust in its operation as it is indefinite in its terms. The supreme court of the United States, in Railroad Commission Cases, 116 U. S. 336, 6 Sup. Ct. 334, 348 388, 391, 1191, refers to this Tennessee case, and substantially approves it by distinguishing the case then before the court from the Tennessee case. This case is also used to support the text in 8 Am. & Eng. Enc. Law, p. 935, where it is said: 'Although a statute has been held to be unconstitutional which left it to the jury to determine whether or not a charge was excessive and unreasonable, in order to ascertain whether a penalty is recoverable, yet where the action is merely for recovery of the illegal excess over reasonable rates, this is a question which is a proper one for a jury.' Mr. Justice Brewer, in the case of Railway Co. v. Dey, 35 Fed. 866, had under consideration the provision of a statute similar to the one we have before us, and, while the statute was upheld, it was only because there was a schedule of rates provided in the act which rendered the test of reasonableness definite and certain. The learned judge there said: "Now the contention of complainants is that the substance of these provisions is that, if a railroad company charges an unreasonable rate, it shall be deemed a criminal, and punished by fine, and that such a statute is too indefinite and uncertain, no man being able to tell in advance what in fact is, or what any jury will find to be, a reasonable charge. If this were the construction to be placed upon this act as a whole, it would certainly be obnoxious to complainant's criticisms, for no penal law can be sustained

unless its mandates are so clearly expressed that any ordinary person can determine in advance what he may and what he may not do under it. In Dwar. St. 652, it is laid down that it is impossible to dissent from the doctrine of Lord Coke that 'acts of parliament ought to be plainly and clearly, and not cunningly and darkly, penned, especially in legal matters.' *See also U. S. v. Sharp, pet, C. C. 122, Fed. Cas. 16. 264: The Enterprise, 1 Paine, 34, Fed. Cas. No. 4. 499; Bish. St. Crimes 41; Lieb. Herm 156. And the learned judge concludes there is very little difference between a provision of the Chinese Code, which prescribed a penalty against any one who should be guilty of 'improper conduct' and a statute which makes it a criminal offense to charge more than a reasonable rate. The same learned judge discussing the kindred subject of unreasonable difference in rates in Tozar v. U. S. 52 Fed. 917, said: 'But, in order to constitute a crime, the act must be one which the party is able to know in advance whether it is criminal or not. The criminality of an act cannot depend upon whether a jury may think it reasonable or unreasonable. There must be some definiteness and certainty. When we look on the other side of the question, we find the contention of the state supported by neither reason or authority. No case can be found, we believe, where such indefinite legislation has been upheld by any court when a crime is sought to be imputed to the accused. In the case from 77 Ill. the court said: that section, by itself, makes the offense to consist in taking more than a fair and reasonable rate of toll and compensation, without reference to any standard of what is fair and reasonable. In such case it may be seen different persons have different opinions as to what is a fair and reasonable rate. Courts and juries too would differ, and at one time or place a defendant might be convicted and fined in a large amount for the same act, which in another place or at another time, would be held to be no breach of the law, and what might be thought a fair and reasonable rate on one road might be thought otherwise upon another road. There would be no certainty of being able to comply with the law. A railroad corporation, with the purpose of conforming to the law, might fix its rates at what it believed to be reasonable, and yet be subjected to the heavy penalties here prescribed. The statute furnishes evidence that it did not intend to leave the railroad in this state of uncertainty and danger, and exposed to such seeming injustice. The

eighth section provides how reasonable rates shall be ascertained, what they shall be, and that the railroad and warehouse commissioners for each of the railroad corporations in the state a schedule of reasonable maximum rates thus furnishing a uniform rule for the guidance of the railroad companies. These authorities and the argument abundantly supporting them are sufficient."

"Other objections to the judgment below need not be discussed, as the one noted is fatal, and the statute cannot be enforced as a penal statute."

Louisville & N. R. Co. v. Commonwealth 35 S. W. Rep. 129-131.

In the aggregate the foregoing authorities prove and demonstrate that, though often neglected, the ancient maxim "Ubi jus incertum ibi jus nullum," (Where the law is uncertain there is no law) is still a fundamental part of our jurisprudence, and that in consequence all uncertain penal statutes, are unconstitutional because not constituting "Due process of Law." In the following chapter the whole of this discussion will be summarized, and some hitherto overlooked-for applications of the doctrine will be suggested.

THE APPLICATION.

When it was first determined by the Free Speech League to publish these collected essays I thought to prepare for this last chapter a summary of all the generalizations which I have hereinbefore defended, and to make an application of these principals to various statutes which might be annulled by virtue of them. However, I now deem that to require so much space and time as to preclude the execution of my original intention. I therefore will content myself by briefly suggesting a comparatively few penal statutes which it seems to me are not "the law," and conviction under which is not "due process of law," because the statutes are devoid of any definite criteria of guilt.

The first of these that I shall name are the Sunday laws of the several states which except "necessary" labor, without telling us by what standard to determine that degree of urgency which will exempt a laborious act from criminality. The next class is "blasphemy" laws, such as exist in Pennsylvania, wherein blasphemy is not defined. Equally uncertain and unconstitutional are the laws against "profane swearing," etc., without defining the statutory words, leaving the judge to enact any definition of the crime that he may choose in the exercise of a legislative discretion.

The criminal nuisance statute of New York makes most of its criteria of guilt to depend upon whether or not an alleged nuisance affects a "considerable number of persons," leaving it for a court of jury to say how many constitute a "considerable number." Under this statute it is also a crime to "annoy" them without defining what kind of annoyance shall constitute the offence, nor informing us of any standard of judgment by which to determine its presence.

The medical laws of many states penalize he act of "practicing medicine" by unlicensed physicians, without telling what shall constitute the prohibited act of "practicing medicine" and some of these statutes exempt those who only pre-

scribe "family remedies," without informing us by what test to separate "family remedies" from non-family remedies. All such laws as these above referred to, it seems to me, are void for uncertainty in the definition of the crime.

We have a Federal statute against railroads, which statute declares it a crime to conspire "to make or give any undue or unreasonable preference or advantage," etc., without telling us by what standard the "reasonableness" of a preference or advantage is to be judged. Such a law surely cannot constitute "due process of law" under the foregoing authorities, nor under a scientific conception of "law." Equally unconstitutional is the President's proposition to exempt "good" trusts from the operation of the Sherman anti-trust law unless the statute shall furnish the standard, general equal and certain by which the judgment is unavoidably and uniformly determined. Such an exemption cannot be left to the arbitrary and lawless will of a commission or a cabinet officer. Without this certainty the proposed amendment might even have the effect of annulling the original act.

It is declared a crime to send through the mails "any article or thing intended or adapted for an indecent or immoral use," with not the slightest intimation of the standard by which we are to arrive at a judgment about the "immorality" to which the "article or thing" may be adapted. It is also a crime to give information by mail as to where such "article or thing" may be had. Furthermore it is a crime to send through the mail anything upon the outside of which are any 'indecent or scurrilous epithets." This seems about the acme of uncertainty and recently resulted in the arrest of a poor wit who addressed a letter to "Teddy, Bombastus Furioso, White House, Washington, D. C." Haven't we already descended beneath the tyrannous uncertainty of a barbarous Chinese Code which punishes all "improper" conduct?

Under the abridgement of freedom of speech and of the press created by the "Criminal Anarchy" statutes of New York State, among other things it becomes a crime to advocate violence against officers of "any civilized nation" without any test by which to determine what constitutes civilization. If a court or jury was called upon to decide whether or not Russia or China were "civilized nations" there might be much difference of opinion and the conclusion would always be de-

termined by *ex post facto* standards, personal to the court or jury and not created by the law-enacting power. Here as in all such cases, the law is a nullity because "where the law is uncertain there is no law."

However, the foregoing illustrations are laws which are comparatively seldom enforced, and this may in part explain the fact that their constitutionality has never been questioned. But this explanation cannot explain the other fact that, notwithstanding over 5000 prosecutions, no one has ever presented for adjudication, as to their constitutionality, those elusively vague laws existing in all the states and in our national code, and which penalize in various ways "obscene, indecent, filthy or disgusting" literature and art, and none of which statutes furnish any criteria by which to draw the line between the degrees of indecency which are criminal and those which are only a matter of bad taste. In many published articles I have pointed out the great variety of official and unofficial modesty.

Reprints of most of these articles will be sent to any judge upon request made to THE FREE SPEECH LEAGUE, 120 Lexington Ave., New York City. An equally numerous variety in our conception of the "obscene" will be discovered by any person making a comparative critical study of the "tests of obscenity" always created by judicial legislation. I am hoping soon to prepare an exhibition of these mutually destructive and contradictory "tests" of guilt.

Although such legislation as we are now considering is utterly devoid of even the semblance of criteria of guilt, yet no court has ever been asked to annul the statutes on that account. Notwithstanding this, a few courts have *all but* declared such laws unconstitutional when only asked to give a defendant the benefit of the doubt as to whether his act came within the uncertain statute.

The highest court of the State of Indiana has left us an instructive opinion. The court is construeing a statute against "notorious lewdness or public indecency." No question of the constitutionality of the statute was before the court, yet after reviewing English authorities, the court continues its reflections thus: "It would therefore appear that *the term 'public indecency' has no fixed legal meaning—is vague and indefinite, and cannot in itself imply a definite offence.* And hence, the courts, by a kind of judicial legislation, in England and the United States, have usually limited the operation of the term to

public displays of the naked person, the publication, sale or exhibition of obscene books and prints, or the exhibition of a monster—acts which have a direct bearing on public morals, and effect the body of society. Thus it will be perceived that so far as there is a legal meaning attached to the term, it is different from and more limited than the commonly accepted meaning given by Webster to the word indecency. A statute relative to a misdemeanor of the grade and character of this, and prescribing so severe a penalty as the deprivation of liberty by imprisonment, *ought to be clearly worded, so as to leave no doubt or ambiguity about its meaning*, before it should be construed to include a large and undefined class of offences against morality. * * * This statute, under such circumstances, should be in itself explicit, and should not depend for vitality upon another act defining the meaning of words. * * If the statute is given the broad construction contended for by the prosecution, who is to determine what phrases amount to an offence under it? Is the public sentiment of each locality to be reflected through the jury?" (Conviction reversed because act not within the statute, that being all that was before the court).

Mc Junkins vs. State, 10 Ind. 145 ~~(A. D. 1858).~~

In another place I find a quotation to the point, but the original source of which I do not know with certainty. From the connection in which it is published I infer that it is quoted from an unofficial report of the remarks of the late Judge Lowell, of Boston, while imposing a nominal fine upon one Jones, who had pleaded guilty to distributing, "Clark's Marriage Guide" through the mails.

"Crime should be so clearly defined that there can be no mistaking it. Murder, homicide, arson, larceny, burglary, forggery, are so defined that they cannot be misunderstood. If obscenity is a crime punishable by fine and imprisonment it ought to be so clearly described that we may know in what it consists, and that accused persons may not be at the mercy of a man, or a number of men who construe what is obscene, indecent or immoral by their own special opinion or notion of morality or immorality. What is obscene to one man may be pure as mountain snow to another. One man should not and cannot decide for other men."

Requoted from Heywood's Defence, p. 29.

In another case a similiarly vague statute made it a mis-

demeanor to "commit any act injurious to the public health, or public morals, or the preversion or obstruction of public justice or the due administration of the law." The court said: "We cannot conceive how a crime can, on any sound principle, be defined in so vague a fashion. Criminality depends, under it, upon the moral idiosyncrasies of the individuals who compose the court or jury. The standard of crime would be ever varying, and the courts would constantly be appealed to as the instruments of moral reform, changing with all fluctuations of moral sentiment. The law is simply null. The constitution which forbids *ex post facto* laws, could not tolerate a law which would make an act a crime, or not, according to the moral sentiment which might happen to prevail with the judge or jury after the act had been committed."

Ex parte Andrew Jackson, 45 Ark. 164.

One United States Court, although not asked to do so, has all but declared the postal laws against "obscene" literature to be unconstitutional—as the necessary result of their uncertainty.

"We have been taught to believe that it was the greatest injustice toward the common people of old Rome when the laws they were commanded to obey, under Caligula, were written in small characters, and hung upon high pillars, thus more effectually to insnare the people. How much advantage may we justly claim over the old Romans, if our criminal laws are so obscurely written that one cannot tell when he is violating them? If the rule contended for here is to be applied to the defendant, he will be put upon trial for an act which he could not by perusing the law have ascertained was an offence. My own sense of justice revolts at the idea. I cannot give it my sanction. * * * The indictment is quashed, and the defendant is discharged."

U. S. v. Commerford, 25 Fed. Rep. 904. West Dist. of Tex.

I have made no search for statutes of the kind to which the principles contended for in the foregoing essays should be applied. Those which I have mentioned as illustrative examples are such as have been called to my attention in the ordinary pursuits of my vocation as a lawyer, and literateur. These selected suggestions perhaps are not the most fortunate illustrations for the application of this doctrine and certainly cannot be the only statutes exhibiting such deplorable absence of criteria of guilt. The essential purpose of my discussion

has not been so much to destroy any particular statute as to resurrect and revivify for constant use the old and self-evident truth expressed by the maxim "Ubi jus incertum ibi jus nullum," (where the law is uncertain there is no law). If I shall have contributed only a little to that end then I am amply repaid for my otherwise unremunerated work in this behalf.

It is a conceded rule that precision in the description of an offence as alleged in an indictment is of the greatest importance. The same reasons apply with even greater force toward requiring even greater certainty in a statute declaring conduct to be punishable as such. The facts which are to be penalized must be specifically and accurately defined in a statute which makes them punishable. If this is not done we must declare such laws to be unconstitutional as not constituting "law," not "due process of law." The failure to do this means only that we are prepared to abandon a government according to law, and revert to the arbitrary despotism of the courts, who under uncertain statutes will punish men for crimes which they could not know to be such when the act was committed, guilt of which is determined according to ex post facto tests of criminality which are of judicial creation, not having the specific endorsement of any of the three branches of the legislative department of the government, and as to the nature of which criteria of guilt no lawyer could advise a client in advance of the trial. Courts seem to have upheld and enforced some of these outrageous uncertain statutes, but it is only a seeming endorsement, because the uncertainties and the consequences of them, as herein contended for, practically have never been presented for adjudication. I cannot believe that when this is properly done, that any court of last resort will ever give its sanction for the step backward which would destroy all that has been thus far gained in the battle for "liberty" under "law" as against the lawless despotism of men in official station. It will take more than one decision of the Supreme Court of the United States to convince me that this is a permanent possibility in our country.

While I was reading the proof sheets of the foregoing essays my attention was directed to two other classes of constructive offenses to which I believe I should call attention.

Under the scientific conception of the law which is herein-

before defended it would be impossible that any one could be punished for a contempt of court, except for acts committed in the very presence of the court, or its officers in the actual performance of their official duty and of such a character as to *actually* interfere with the orderly conduct of the judicial business. Under a scientific conception of *law,* courts would be precluded from construeing an injury to their humanly weak vanity as a public injury to be avenged in the name of the law. This would make impossible such a decision as that very recently rendered in Minnesota (see State Board v. Hart, 116 N. W. Rep. 212, also "The Progressing Despotism of the Judiciary," in *The Arena,* July, 1908).

Another circumstance just coming under my notice suggests to me that perhaps the United States army officers exercise more lawless power over the enlisted men than any other branch of our government, and probably exceeding even the outrages of the Post Office Department.

Of course the army owes its very existence to the Constitution and the powers by it vested in Congress. It follows that every man in the army, equally with those out of it, have the same identical protection against arbitrary power. Perhaps it may be safely assumed that decipline to the extent only of dismissal may be inflicted under army regulation, yet it is quite certain that army officers cannot enact a criminal code. (See U. S. v. Mathews, 146 Fed. Rep. 308,—U. S. v. Eaton, 144 U. S. 687.)

But let us assume that army officials have been by the Constitution endowed with legislative power adequate to the passing of penal statutes, what must we say about an army regulation which penalizes without further description "offences against the flag and the army." Under this outrageously vague regulation one Buwalda, a private soldier with an unexceptional record of 15 years of army service was given five years' imprisonment because off the military reservation and while not on duty, he shook hands with an unpopular woman (Miss Emma Goldman), who has never committed any offence against the United States and who says that it is impossible for her to live down the falsehoods which newspapers have told about her, as much as it is impossible for her to live up to her reputation. If such conduct under such regulation can constitute "due process of law," then we had better abolish our Constitution and go to Russia to secure liberty.

The Free Speech League, (120 Lexington Ave., N. Y. City,) has in preparation a statement of the several constitutional objections to all "obscenity" laws; also a syllabus of the argument for each, and citations to Mr. Schroeder's more elaborate arguments in support of those contentions. Later, these articles revised, and others yet to be written will be published under the title of "Obscene Literature and Constitutional Law"

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